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Supreme Court of the United States,

OCTOBER TERM, 1928. No. 130.

OLD COLONY TRUST COMPANY, *et al.*,
Executors,
Plaintiff,
AGAINST
COMMISSIONER OF INTERNAL REVENUE,
Defendant.

SUPPLEMENTAL BRIEF ON BEHALF OF OLD COLONY TRUST COMPANY, ET AL., EXECUTORS, SHOWING JURISDICTION OF THE COURT.

Upon the oral argument of this case the Court inquired how it had jurisdiction over a case originating in the Board of Tax Appeals. This brief is filed in accordance with the request of the Court then made. Its purpose is to show that power to review decisions of the Board of Tax Appeals has been properly conferred by Congress on the Circuit Courts of Appeals, and that this case is properly in the Circuit Court of Appeals of the First Circuit and hence, under Section 239 of the Judicial Code, the certified question is properly before this Court.

There is no question but that the statutes provide that on petition, as in the case at bar, the Circuit Courts of Appeal may review decisions of the Board of Tax Appeals. The sole question at issue is whether, in so providing, Congress exceeded its constitutional power.

Statement of Case.

As appearing in the record in the Court below, this case, involving the Federal income taxes of William M. Wood, deceased, for the years 1919 and 1920, originated by the filing of a petition with the Board of Tax Appeals on August 22, 1925, appealing from a decision of the Commissioner of Internal Revenue of which the taxpayer was notified on June 27, 1925. Such appeal was taken pursuant to Sections 274(a) and 280 of the Revenue Act of 1924. The Board of Tax Appeals had jurisdiction under Section 283(b) of the Revenue Act of 1926.

The case was heard by the Board of Tax Appeals on April 11, 1927, its opinion was promulgated on July 13, 1927, and its order of redetermination fixing the amount of the deficiencies was entered on the same date, and amended on November 12, 1927.

As shown by the certificate, the taxpayer, pursuant to Sections 1001 and 1003 of the Revenue Act of 1926, and Rule 38 of the Circuit Court of Appeals for the First Circuit, filed a petition for review of the Board's decision by the Circuit Court of Appeals for the First Circuit. (Certificate, p. 2.) The Board thereupon sent the record to the Circuit Court of Appeals for the First Circuit which certified a question of law to this Court on May 2, 1928, pursuant to Section 239 of the Judicial Code, as amended. (Certificate, p. 3.)

Constitution and Statutes.

In Appendix A of this brief we have set forth the provisions of the Revenue Act of 1926 with respect to the Board of Tax Appeals (Section 1000), and the court review of its decisions (Sections 1001 to 1004), the provisions conferring jurisdiction on the Board of Tax Appeals (Sections 274, 283), provisions of the Revenue Acts of 1924 and 1928 with respect to the Board of Tax Appeals, and other relevant provisions of the statutes, and also the relevant provisions of the Constitution of the United States.

Summary of Argument.

Sections 1001 and 1003 of the Revenue Act of 1926, provide for review by the Circuit Courts of Appeals of decisions of the Board of Tax Appeals and the sole issue before the Court is the constitutionality of these sections. Such statutes are not unconstitutional unless they impose on the courts the exercise of non-judicial powers.

If the Board of Tax Appeals itself is vested with judicial power, it was within the power of Congress to provide for review of its decisions by the courts. Such Board is not a constitutional court, but is a legislative tribunal properly constituted in aid of the taxing power and properly vested with judicial power to determine tax controversies between the Government and taxpayers.

Even if the Board of Tax Appeals is regarded as an administrative tribunal, not exercising judicial power, Congress could give the courts the power to review its decisions on questions of law, in substantially the same manner as the courts review cease and desist orders of the Federal Trade Commission, without investing the courts with non-judicial power.

Even in those cases where the petition to the Board of Tax Appeals was filed prior to the enactment of the Revenue Act of 1926 and the taxpayer is not denied the right to file a claim for refund, review of decisions of the board does not involve the exercise of non-judicial powers. The statute makes the decisions of the Circuit Court of Appeals final in all cases and conclusive on the parties as to all issues decided. Even were this not the case review of the decisions of the Board of Tax Appeals as provided in the statute is a judicial function.

The practical consequences of holding unconstitutional the provisions for court review, would be serious. Such a holding would deprive of their authority many decisions already rendered by the courts, and would raise grave doubt as to the validity of all of the provisions establishing the Board of Tax Appeals.

Preliminary Statement.

The Revenue Act of 1926, enacted February 26, 1926, continued the existence of the Board of Tax Appeals, first established by Section 900 of the Revenue Act of 1924, enacted June 2, 1924. The Board of Tax Appeals was created for the purpose of providing taxpayers an opportunity to secure an independent judicial review of the Commisisoner's determination of additional income and estate taxes in advance of the actual payment. Prior to the enactment of the Revenue Act of 1924 taxpayers were compelled to pay the amount of tax finally determined by the Commissioner and their only remedy was a court proceeding to recover the amount paid. The functions and status of the Board were substantially modified by the Revenue Act of 1926, as is shown below.

(1) *The present provisions as to the Board of Tax Appeals.*

The present provisions as to the establishment of the Board of Tax Appeals are contained in Sections 900 to 911 of the Revenue Act of 1924, as amended and added by Section 1000 of the Revenue Act of 1926. (Appendix A, pp. 35 to 43.) These statutes have been amended by Sections 601 to 603 of the Revenue Act of 1928, but such amendments do not make any fundamental change in the character of the Board.

The 1926 Act provides substantially as follows:

The Board of Tax Appeals is "an independent agency in the executive branch of the Government". (Section 900.) It is charged with the function of reviewing, on application of the taxpayers, determinations of the Commissioner of Internal Revenue as to the amount of additional income or estate taxes due the Government from taxpayers. (Sections 274, 308.)

The sixteen members of the Board are appointed for definite terms by the President, by and with the advice and consent of the Senate, and are removable by the President for specified causes. (Section 901.)

The Board designates its own chairman, and has a seal, which shall be judicially noticed. (Section 903.) The Board has such jurisdiction as is conferred on it by Title II and Title III of the Revenue Act of 1926 or by subsequent laws. (Section 904.)

Notice and opportunity to be heard are to be given to the Commissioner and the taxpayer in every case, and the Commissioner is represented by counsel. Hearings before the Board and its divisions are public, and are stenographically reported. Proceedings of the Board are conducted under such rules of practice and procedure as the Board prescribes and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia. Pleadings, notices, etc., are served by registered mail. The Board makes written findings of fact and decisions, except where the case is dismissed on motion, and may also write an opinion. All reports of the Board and all transcripts of evidence are public records, and opinions of the Board are published at Government expense. (Section 907.)

Board members may administer oaths, examine witnesses, and issue subpœnas. (Section 908.) Witnesses receive the same fees and mileage as witnesses in the Federal courts. (Section 909.)

The 1926 statute provides for a notice by the Commissioner of Internal Revenue to the taxpayer by registered mail of the determination of a deficiency in income tax, *i. e.*, an amount of income tax in excess of that reported, or previously assessed or paid, and within sixty days thereafter taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. (Section 274(a).) After the sending of such a notice, the Commissioner, except in certain special cases, such as bankruptcy, cannot assess the deficiency during the sixty day appeal period, nor, if a petition is filed with the Board, until the decision of the Board has become final, and the taxpayer is given the right to enjoin the making of any such assessment. (Section 274(a).)

If the taxpayer files a petition with the Board the deficiency as redetermined by the Board is to be assessed and paid. No part of the deficiency disallowed by the Board can be assessed or collected by the Commissioner. (Section 274(b).)

The Board is given jurisdiction to increase the deficiency over that shown in the Commissioner's notice if the Commissioner makes such a claim at or before the hearing (Section 274(e)), and to determine that the taxpayer not only owes no tax, but has overpaid. (Section 284(e).) The Board is given jurisdiction with respect to determination of taxes for years prior to 1926, and also of all appeals pending at the enactment of the Revenue Act of 1926. (Section 283.)

The statute provides for judicial review of the Board's decisions by filing by the Commissioner or the taxpayer of a petition for review by a Circuit Court of Appeals under rules to be adopted by such courts, or if no rules are adopted, in accordance with the practice as to a writ of error. (Section 1001(a) (b).) On September 17, 1926, a conference of the senior judges, presided over by the Chief Justice of the Supreme Court, recommended rules, which have now been adopted in substance by all of the Circuit Courts of Appeals and by the Court of Appeals of the District of Columbia. The Circuit Courts of Appeals and the Court of Appeals of the District of Columbia are given exclusive jurisdiction to review the decisions of the Board "(except as provided in Section 239 of the Judicial Code as amended)", and the judgments of such courts are made final, except for review by this Court on certiorari. (Section 1003(a).)

Upon such review the courts are given power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for rehearing. (Section 1003(b).)

Detailed provisions as to when the decision of the Board becomes final are contained in Section 1005.

Similar procedure for the determination and review of deficiencies in estate taxes is prescribed in Sections 308, 312, 318 and 319 of the Revenue Act of 1926.

A taxpayer is not required to appeal to the Board of Tax Appeals if he desires to contest the Commissioner's determination but may waive such appeal, pay the tax, file a claim for refund, and sue for recovery of the tax, if he so desires.

The Board makes no independent investigations, and its function is to review determinations of the Commissioner of Internal Revenue as to the amount of additional income and estate taxes, on the basis of the evidence presented to the Board at the hearing and in accordance with the laws applicable.

(2) *The constitution and status of the Board of Tax Appeals under the Revenue Act of 1924.*

Although the Revenue Act of 1926 continued the Board of Tax Appeals created by the Revenue Act of 1924, it made substantial changes in the Board as it existed under the earlier act which was before the Court in *Blair* v. *Oesterlein Machine Co.*, (1927) 275 U. S. 220, and *Williamsport Wire Rope Co.* v. *United States*, (1928) 277 U. S. 551. Under the 1924 Act the deficiency determined by the Board was assessed and collected (Section 274(b)), but the taxpayer could file a claim for refund, and if such claim was denied, sue for recovery of the tax. (Section 281, Section 3226 R. S.) If the Board disallowed the deficiency claimed by the Commissioner the Commissioner could not assess or distrain, but could sue for such deficiency without assessment. (Section 274(b).) In such court proceedings the case was tried *de novo*, but the Board's findings of fact were *prima facie* evidence of the facts. (Section 900(g).)

Under the Revenue Act of 1926, however, the decision of the Board, unless reversed or reviewed by the courts, is final and conclusive on the parties. The Commissioner cannot assess, collect, or sue for a deficiency disallowed by the Board, and the taxpayer, where he filed his petition after the enact-

ment of the Revenue Act of 1926, cannot claim a refund of any amount paid pursuant to the Board's decision. (Section 284(d); Section 3226 R. S.)

Other important differences between the two statutes are that under the 1924 Act the Board prescribed its own rules of evidence. (Section 900(h).) Under the 1926 Act the Board is required to follow the rules of evidence applicable in courts of equity in the District of Columbia (Section 907). Under the 1924 Act the Board had no power to order refunds; under the 1926 Act such power is specifically given. (Section 284(e).) Under the 1924 Act the taxpayer had no power to enjoin assessments or distraints during the pendency of the Board proceedings. Under the 1926 Act the right of injunction is given. (Section 274(a).)

(3) *Cases pending when the 1926 Act was adopted.*

Many cases were pending before the Board of Tax Appeals on February 26, 1926, when the 1926 Act was enacted. These appeals had been filed under the 1924 Act, when the Board's decision did not finally determine the rights of either party. The Board was given jurisdiction of such appeals (Section 283) and the new provisions for court review applied to all decisions in such cases, except where the hearing had been held prior to the passage of the Revenue Act of 1926. (Section 283(j).) In such cases the finding of the Board is conclusive on the Commissioner, just as in other cases. As to taxpayers, however, under the law in force when they elected to appeal to the Board and framed their pleadings no such consequence was attached to such appeal, and Congress did not cut off their right to file a claim for refund, and Section 284(d) of the Revenue Act of 1926 does not, therefore, specifically deny the right to file a claim for refund.

Petitions for review of decisions of the Board of Tax Appeals have been filed in many cases both by the taxpayers and by the Government. Eight of the nine Circuit Courts of Appeals and the Court of Appeals of the District of Columbia have rendered decisions on such cases without doubting their

jurisdiction. A list of these cases is given in Appendix B hereof. Most of these cases were cases where the petition to the Board of Tax Appeals was filed prior to the enactment of the Revenue Act of 1926. In addition to the sixty-six cases listed in Appendix B, which have already been decided, we are advised that there are approximately 320 review cases now pending in the Circuit Courts of Appeals throughout the country.

ARGUMENT.

Congress had power under the Constitution to provide for review of decisions of the Board of Tax Appeals by the Circuit Courts of Appeals.

The only question is whether non-judicial power is conferred on the Circuit Courts of Appeals by Sections 1001 to 1003 of the Revenue Act of 1926, which provide for court review of decisions of the Board of Tax Appeals by the Circuit Courts of Appeals and the Court of Appeals of the District of Columbia, subject to certification to this court of questions of law under Section 239 of the Judicial Code as amended and to certiorari by this court under Section 240 of the Judicial Code as amended. The intent of Congress to vest such jurisdiction in the Circuit Courts of Appeals is clear and such courts are authorized by Section 239 of the Judicial Code as amended to certify questions or propositions of law to this court "in any case, civil or criminal, in the Circuit Court of Appeals."

I. If the Board of Tax Appeals is vested with judicial power, Congress had power to provide for review of its decisions by the courts.

(a) *The Board of Tax Appeals is a "legislative tribunal" exercising judicial and not administrative power, except in special assessment cases, although such power is not derived from Article III.*

The Board of Tax Appeals is of course not a court within the meaning of Article III of the Constitution and does not derive judicial power from that section. The functions of the Board and the nature of the proceedings before it show clearly, however, that at least in ordinary cases the Board exercises judicial powers. This was the intention of Congress as shown by the reports of the House Ways and Means Committee and the Senate Finance Committee, reprinted as Appendix D. It was within the power of Congress to establish the Board as a legislative tribunal exercising judicial power, although authority to confer such power was not derived from Article III.

Congress exercises the function of creating courts or tribunals under several different grants of power. It creates courts inferior to the Supreme Court under Article III of the Constitution. These courts, generally referred to as "constitutional courts", exercise only the judicial power referred to in Article III and may be vested with no other judicial power.

Interstate Commerce Commission v. *Brimson* (1894), 154 U. S. 447, 485;

Keller v. *Potomac Electric Company* (1923), 261 U. S. 428;

Postum Cereal Company v. *California Fig Nut Company* (1926), 272 U. S. 693;

Liberty Warehouse Company v. *Grannis* (1927), 273 U. S. 70.

Congress may exercise, however, and has exercised, its powers to create courts or judicial tribunals under other grants of power than that contained in Article III of the Constitution. It has created courts to exercise complete jurisdiction over the District of Columbia by reason of the exclusive jurisdiction that Congress has over the District. It has created courts known as "territorial courts" by reason of the power of the United States to govern the territory which it owns. *The City of Panama* (1879), 101 U. S. 453, 460; *Reynolds* v. *United States* (1878), 98 U. S. 145, 154, *McAlister* v. *United States* (1891), 141 U. S. 174, 184. In regard to courts created by Congress under its power to make rules and regulations respecting territory belonging to the United States, Chief Justice Marshall in the case of *American Insurance Company* v. *Cantor* (1828), 1 Pet. 511, 546, said:

> "They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the 3d Article of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the states in those courts only which are established in pursuance of the third article of the Constitution, the same limitation does not extend to the territories. In legislating for them Congress exercises the combined powers of the general and of a state government."

In addition to legislative tribunals created under the power to govern territories, Congress may also create tribunals to determine questions arising between the United States and private individuals in regard to the collection of revenue, the granting of public lands, the collection of debts, the government of Indian tribes, and the like.

United States v. *Ferreira* (1851), 13 How. 40; (*Gordon* v. *United States* (1864), 117 U. S. 697, 699); the granting of public lands (*United States* v. *Coe* (1894), 155 U. S. 76, 86); the maintenance of military and naval forces (*Winthrop, Military Laws* and *Precedents* (2d ed., reprint 1920), p. 48; *Carter* v. *Roberts* (1900), 177 U. S. 496; *Ex parte Dickey* (D. C. Me., 1913), 204 Fed. 322; *Ex parte Foley* (D. C. Ky., 1917), 243 Fed. 470; *United States* v. *Sugar* (D. C. Mich., 1917), 243 Fed. 423; *United States* v. *Stephens* (D. C. Del., 1917), 245 Fed. 956, affirmed 247 U. S. 504; *United States* v. *McDonald* (1920), 265 Fed. 754, 759, 760); the occupation by military forces of territory as a conquest (*Santiago* v. *Nogueras* (1909), 214 U. S. 260); the government of Indian tribes (*Stephens* v. *Cherokee Nation* (1899), 174 U. S. 445, 477-8; *Wallace* v. *Adams* (1907), 204 U. S. 415; *Ross* v. *Stewart* (1913), 227 U. S. 530; *In re Jessie's Heirs* (D. C. Okla., 1919), 259 Fed. 694).

The power of Congress to levy and collect taxes carries with it the power to provide all the necessary means for such levying and collection. *United States* v. *288 packages of Merry World Tobacco* (1900), 103 Fed. 453, 455.

See Opinion as to the powers of Congress to create tribunals appearing in 68 Cong. Rec., pp. 3181-3182, reprinted as Appendix C of this brief.

Under that power Congress created the Board of Tax Appeals and vested it with judicial power.

The Committee on Ways and Means of the House of Representatives and the Senate Finance Committee, in their reports dealing with the establishment of the Board of Tax Appeals under the Revenue Act of 1926, said:

> "In the view of the Committee the decisions of the Board are judicial and not legislative or administrative determinations." (Appendix D, pp. 66 and 67.)

As stated by this Court in the case of *Blair* v. *Oesterlein Machine Company* (1927), 275 U. S. 220, 226:

> "An examination of the sections creating the Board and investing it with power, can leave no doubt that they were intended to confer upon it appellate powers which are judicial in character."

The decision of the Board in ordinary cases is not of an administrative or advisory nature such as was considered in *Keller* v. *Potomac Electric Company* (1923), 261 U. S. 428 at 444, and *Postum Cereal Company* v. *California Fig Nut Company* (1927), 272 U. S. 693,—its decision results in a determination which ends the litigation between adverse parties subject to court review as to questions of law. The decision of the Board is not subject to review by any executive officer as was true of the determinations considered in the cases of *United States* v. *Ferreira* (1851), 13 How. 40; *Gordon* v. *United States* (1864), 117 U. S. 697, and *In Re Sanborn* (1893), 148 U. S. 222.

It is true that the Board of Tax Appeals does not issue execution to carry its judgment into effect, but the issuance of an execution is not an essential characteristic of the exercise of the judicial power. *Fidelity National Bank* v. *Swope* (1927), 274 U. S. 123, 132; *Tutun* v. *United States* (1926), 270 U. S. 568, 576-577. The United States Court of Claims which is a tribunal clearly exercising judicial power, does not issue execution. *La Albra Silver Mining Company* v. *U. S.* (1899), 175 U. S. 423, 461.

All of the attributes of a judicial determination are present in a decision of the Board. The parties are adverse in interest, so that the case of *South Spring Mining Company* v. *Amador Medean Gold Mining Company* (1892), 145 U. S. 300, does not apply. The controversies are actual controversies and not attempts to secure an abstract determination such as were considered in *Muskrat* v. *United States* (1911), 219 U. S. 346-361, and *Texas* v. *Interstate Commerce Commission* (1922), 258 U. S. 158, 162. Except in special assessment cases (See *Williamsport Wire Rope Co* v. *United States*

(1928), 277 U. S. 551) the controversies decided by the Board are of the same nature and are decided on the same basis as controversies over the revenue arising in the District Courts, or the U. S. Court of Claims.

Congress, therefore, clearly had the power to create a legislative tribunal under its power to levy and collect taxes and to vest such a tribunal with judicial powers. The Board of Tax Appeals is such a tribunal vested with judicial power.

(b) *Congress had authority to provide for review by the Circuit Courts of Appeals of decisions of the Board in the exercise of such judicial power.*

If the decisions of the Board of Tax Appeals are in the exercise of judicial power, although not conferred under Article III, the review of decisions in the exercise of such power is a strictly judicial function.

If the action of the Circuit Courts of Appeals be considered appellate and revisory, there is no constitutional objection to providing for the review of the judicial determination of the Board of Tax Appeals by those courts. The fact that a legislative tribunal is vested with judicial power not derived from Article III does not make it improper to provide for judicial review of such decisions by courts deriving their authority from Article III.

The judicial power vested in the territorial courts and the courts of the District of Columbia is not judicial power derived from Article III, yet review of the decisions of such tribunals by the constitutional courts is proper in cases where such tribunals in fact exercise judicial power.

Reynolds v. *United States* (1878), 98 U. S. 145;
The City of Panama (1879), 101 U. S. 453.

The judicial power exercised by the Board of General Appraisers was not derived from Article III of the Constitution, but judicial review of their decisions was deemed proper.

Marshall Field v. *Clark* (1892), 143 U. S. 649;

United States v. *Lies* (1898), 170 U. S. 628;
United States v. *Stone & Downer Co.* (1927), 274 U. S. 225.

It may be that when the Board exercises functions other than judicial functions, such as the review of the Commissioner's action in special assessment cases, such action cannot be reviewed by the courts, although even in such cases review on questions of law may be proper. However, where a tribunal exercises both judicial and non-judicial functions its judicial determinations may be reviewed by the courts, although no review may be had of the non-judicial functions. It is well settled that the Supreme Court can review the action of the Court of Claims in cases where that court exercises judicial powers.

DeGroot v. *United States* (1866), 5 Wall. 419, 427;
United States v. *Alire* (1867), 6 Wall. 573, 576;
United States v. *Klein* (1871), 13 Wall. 128, 144;
United States v. *O'Grady* (1874), 22 Wall. 641;
United States v. *Jones* (1886), 119 U. S. 477.

When the Court of Claims or other legislative tribunal exercises powers which are not judicial in nature, this Court has held that it cannot review such action.

Gordon v. *United States* (1864), 117 U. S. 697;
In re Sanborn (1893), 148 U. S. 222;
Keller v. *Potomac Electric Company* (1923), 261 U. S. 428;
Postum Cereal Company v. *California Fig Nut Company* (1927), 272 U. S. 675.

If the action of the Circuit Courts of Appeals be considered original and *de novo,* there is no question as to the validity of the provisions for court review. As stated by the court in *Stephens* v. *Cherokee Nation* (1879), 174 U. S. 445, 447:

"As to the first of these objections, conceding the constitutionality of the legislation otherwise, we need spend

> no time upon it, as it is firmly established that Congress may provide for the review of the action of commissions and boards created by it, exercising only *quasi* judicial powers, by the transfer of their proceedings and decisions, denominated appeals for want of a better term, to judicial tribunals for examination and determination *de novo;* and, as will be presently seen, could certainly do so in respect of the action of tribal authorities."

In the case of *Ruth Iron Company* v. *Commissioner* (1928), 26 F. (2d) 30, the Circuit Court of Appeals for the Eighth Circuit refers to a proceeding before it on petition for review from the Board of Tax Appeals as an original action. Congress could validly provide for an original proceeding in a Circuit Court of Appeals, rather than in a District Court. The power of Congress to establish inferior courts is not limited. It can establish such courts as it sees fit and vest them with original or appellate jurisdiction. *Martin* v. *Hunter* (1816), 1 Wheat. 304, 337; *Insurance Company* v. *Dunn* (1873), 19 Wall, 214, 226. In the latter case, the court said:

> "As regards the inferior courts authorized to be established, Congress may give them such jurisdiction, both original and appellate, within the limits of the Constitution, as it may see fit to confer. How their appellate jurisdiction shall be exercised, is not declared. The whole subject is remitted to the unfettered discretion of Congress."

It is submitted that when the Board of Tax Appeals exercises judicial power, as it did in this case, review of its decision as to questions of law is a judicial function which may properly be vested in the Circuit Courts of Appeals through an original proceeding or an appellate proceeding.

II. Even if the Board of Tax Appeal be regarded as an administrative tribunal, Congress could give the courts power to review its decisions on questions of law.

Even if the Board be considered only an administrative tribunal, the judicial review of its decisions as to questions of law by the Circuit Court of Appeals does not impose on that court the exercise of non-judicial functions. Whether the proceeding in the Circuit Court of Appeals is strictly an original proceeding or not, such review has been sanctioned by this Court in the review of cease and desist orders of the Federal Trade Commission.

The Act with respect to the Federal Trade Commission in Section 45, Title 15, U. S. C. (Act of September 26, 1914, Chapter 311, Section 5, 38 Stat. 719; Act of February 13, 1925, Chapter 229, Section 2, 43 Stat. 939) provides that if any person, partnership or corporation fails to obey an order of the Federal Trade Commission to cease and desist, the Commission may apply to a Circuit Court of Appeals for the enforcement of its order, certifying and filing with its application a transcript of the entire record in the proceeding including all the testimony taken. The court, upon notifying the adverse party, has jurisdiction and has power to make a decree affirming, modifying or setting aside the order of the Commission. The findings of the Commission as to facts, if supported by testimony, are conclusive. If either party shows ground for taking additional testimony the court may refer the matter to the Commission for the taking of such additional testimony and the Commission may then, if it chooses, amend its findings and recommend the modification of its order. The party required by the order to cease and desist may obtain a review of the order in a Circuit Court of Appeals by filing in the court a written petition, in which case the procedure is substantially the same.

In all essential respects, the procedure for review of the orders of the Trade Commission is the same as the procedure for review of the decisions of the Board of Tax Appeals. The decisions of the Federal Trade Commission, like those of the Board of Tax Appeals, are conclusive as to the facts if supported by evidence. The Circuit Court of Appeals in both cases has power to affirm, modify or reverse the decision under review. In both cases the Circuit Court of Appeals has exclusive jurisdiction to review and its decision is final except for review by the Supreme Court.

It is well settled that the Circuit Courts of Appeals are properly invested with jurisdiction of the proceedings for enforcing or reviewing the orders of the Federal Trade Commission and that their decisions may be reviewed by the United States Supreme Court.

Federal Trade Commission v. *Gratz* (1920), 253 U. S. 421;

Federal Trade Commission v. *Beech-nut Packing Company* (1922), 257 U. S. 441;

Federal Trade Commission v. *Curtis Publishing Company* (1923), 260 U. S. 568;

Federal Trade Commission v. *Sinclair Refining Company* (1923), 261 U. S. 463;

Federal Trade Commission v. *Western Meat Company* (1926), 272 U. S. 554;

Federal Trade Commission v. *Eastman Kodak Company* (1927), 274 U. S. 619;

Chamber of Commerce of Minneapolis v. *Federal Trade Commission* (1923), 280 Fed. 45 (8th C. C. A.);

L. B. Silver v. *Federal Trade Commission* (1923), 292 Fed. 752 (6th C. C. A.);

Butterick Publishing Company v. *Federal Trade Commission* (1925), 4 F. (2d) 910 (2nd C. C. A.);

Moir v. *Federal Trade Commission* (1926), 12 F. (2d) 22 (1st C. C. A.);

Federal Trade Commission v. *Balme* (1928), 23 F. (2d) 615.

Congress in providing for review of the Board of Tax Appeals' decisions by the Circuit Courts of Appeals relied upon the judicial approval of the similar provisions for review of the action of the Federal Trade Commission.

The House Ways and Means Committee (House Report No. 1, 69th Congress) in its report on the Revenue Act of 1926 said:

> "Inasmuch as the complicated and technical facts governing tax liability require a determination by a body of experts, the review is taken directly to an appellate court, just as, for instance, in the case of orders of the Federal Trade Commission, and orders of the Secretary of Agriculture under the packers and stockyards act."

See Appendix D, p. 66.

These provisions for review are within the trend of recent legislation with respect to fact finding tribunals with special judicial powers. See The Grain Futures Act (September 21, 1922, Chapter 369, 42 Stat. 98; U. S. C. Title 7, Chapter 1, Sections 8 and 9, and The Packers and Stockyards Act August 15, 1921, Chapter 64, 42 Stat. 159, U. S. C. Title 7, Chapter 9). *F. G. Bishoff* v. *Commissioner of Internal Revenue* (1928), 27 Fed. (2d) 91.

III. Even in those cases where the petition to the Board of Tax Appeals was filed prior to the enactment of the Revenue Act of 1926 and the taxpayer is not denied the right to file a claim for refund, review of decisions of the Board does not involve the exercise of non-judicial powers.

The general plan of procedure under the Revenue Act of 1926 is that if a taxpayer elects to appeal to the Board of Tax Appeals from the Commissioner's decision, the decision of the Board, subject to review by the courts, is final and conclusive on both parties. (Section 274(b), Section 284(d)(e).)

However, Congress did not specifically deny the right to file a claim for refund, after the Tax Board proceeding, to taxpayers who had filed petitions with the Board prior to the enactment of the Revenue Act of 1926. (Section 284(d).) This was a just and equitable provision since when such petitions were filed the Tax Board proceeding was merely a preliminary inconclusive proceeding and the Board had no power to order a refund. The record in the court below shows that the petition in this case was filed with the Board prior to the enactment of the Revenue Act of 1926, and that the hearing was held subsequent thereto.

The fact that in this particular class of cases Congress did not specifically deny the right to file a claim for refund does not prevent the decision of a Circuit Court of Appeals from being a binding and conclusive decision finally settling all issues presented to and passed upon by it.

The statute specifically provides that decisions of the Circuit Court of Appeals shall be final and conclusive on the parties. Section 1003(a) of the Revenue Act of 1926 provides:

> "The Circuit Courts of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board (except as provided in Section 239 of the Judicial Code as amended); *and the judgment of any such court shall be final,* except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in Section 240 of the Judicial Code as amended". (Italics supplied.)

We find nothing in the statutes which would permit any taxpayer to secure a refund or to bring a suit based on grounds with respect to which a final decision of the Circuit Court of Appeals had been rendered adverse to the taxpayer's claim.

The right to sue in any case for the recovery of an internal revenue tax illegally collected is based upon the jurisdiction given to the Federal District Courts and the Court of Claims over such litigation. Section 24, sub-

division 5 and 20, Judicial Code; *United States* v. *Emery, Bird, Thayer Realty Company* (1915), 237 U. S. 28. The right to file a claim for refund rests upon the fact that this is a necessary prerequisite of a suit. (Section 3226 R. S.; *The Rock Island, etc. Railroad Company* v. *United States* (1920), 254 U. S. 141), and that the Commissioner can make a refund or credit after a certain length of time only if such a claim is filed (Section 284 Revenue Act of 1926). There is nothing in the law which would permit a taxpayer successfully to sue for a refund, free from the plea of *res adjudicata,* when such suit was based on grounds as to which a final decision of a Circuit Court of Appeals adverse to the taxpayer had been rendered.

We therefore maintain that a decision by the Circuit Court of Appeals on a petition for review is a proper exercise of judicial power and that such decision is a final decision and *res adjudicata* as to the issues decided by such Court on the merits. In any such case in which a decision has been rendered by the Circuit Court of Appeals the claim for refund would necessarily be limited to issues not passed upon by the Circuit Court of Appeals. This is the view of the law taken in the only two cases discussing the question.

Emery, Executor v. *United States* (1928), 27 F. (2d), 992 (D. C. Pa.);

Old Colony Railroad Co. v. *United States* (1928), 27 F. (2d), 994 (D. C. Mass.).

If the view should be taken that on a suit on a rejected claim for refund the taxpayer could bring the entire controversy into court again (a view which we believe to be incorrect) the Court would nevertheless have jurisdiction where such jurisdiction is expressly conferred and a case or controversy is before it. Thus in the matter of applications for certificates of naturalization it has been held that each application is a case or controversy, the decision in which may be reviewed by the courts, but that nevertheless the Government has the right to bring a new proceeding to cancel the

application granted, and that the prior decision is not *res judicata.*

United States v. *Ness,* 245 U. S. 319;
Tutun v. *United States,* 270 U. S. 568;
Maney v. *United States* (October 22, 1928), 73 L. Ed. 13.

Even if this should be considered as permitting a splitting up of a single controversy or cause of action, there is no reason why Congress could not consent to a suit or proceeding against the United States, although a separate suit or proceeding had been brought in connection with a different question or questions arising in the same controversy. There are other instances where two suits may be brought for the same tax liability for the same period.

Sage v. *United States* (1919), 250 U. S. 33;
Coffey v. *Exchange Bank* (1924), 296 Fed. 807.

It is not essential to determine in this case whether a decision of the Board of Tax Appeals, not reviewed by a Circuit Court of Appeals, is such an exercise of judicial power as to foreclose the taxpayer from filing a claim for refund and bringing suit based on grounds which have been passed upon by the Board of Tax Appeals on the merits. Whatever may be the effect of the Board's decision, it is clear that Congress provided that the decision of the Circuit Court of Appeals should be final and conclusive on the parties as to any matters therein decided.

It should be noted that the Board of Tax Appeals in its proceedings makes no distinction whatsoever between those cases in which the petition was filed before, and those cases in which the petition was filed after, the enactment of the Revenue Act of 1926. All cases heard and decided after the enactment of the Revenue Act of 1926 are heard and decided under exactly the same procedure and on exactly the same basis. Furthermore, in many instances the Board has consolidated for hearing and decision cases in which petitions

were filed before and cases in which petitions were filed after the enactment of the Revenue Act of 1926. The Circuit Courts of Appeals have made no distinction between the two classes of cases. All but four of the cases listed in Appendix B were cases in which the petition was filed prior to the enactment of the Revenue Act of 1926 or in which both classes of cases were joined in one proceeding.

Inspection of the various provisions of the Revenue Act of 1926 dealing with the Board of Tax Appeals (Sections 274, 277, 279, 280, 283, 284, 308, 310, 312, 316, 318, 319 and 1000 to 1005), will show that it would be necessary for the Court substantially to re-write the statute in order to hold invalid the provisions with respect to judicial review of cases where the petition was filed prior to the enactment of the Revenue Act of 1926 and to hold such provisions for judicial review valid in other cases. For example, the Court would have to introduce an exception not made by Congress into the provisions of Section 1000(a) providing for judicial review of all Board decisions rendered after the enactment of the Revenue Act of 1926, except where the hearing had been held prior to the enactment of the Revenue Act of 1926. The Court would have to expand the provisions of Section 283(j) to include all cases where the petition was filed prior to the enactment of the Revenue Act of 1926.

The Court would also have to supply some provision to determine when a decision of the Board of Tax Appeals becomes final in such a case so that the Commissioner may be permitted to assess and collect the tax (see Section 274). The provisions of Section 1005 as to the date on which the Board's decision becomes final do not seem to cover a case where there is no judicial review of the Board's decision. The question would arise as to the period during which the Commissioner was prohibited from assessing under Section 274(a) and this in turn would raise a question as to the period for which the statute of limitations was suspended under Section 277(b). In fact the provisions with respect to the Board of Tax Appeals and with respect to

judicial review of all decisions made after the enactment and the Revenue Act of 1926 are such an integral part of the Revenue Act as to make it extremely difficult to administer or interpret, if such provisions are held invalid in whole or in part, without substantially re-writing the statute.

It is therefore submitted that the fact that the petition in this case was filed prior to the enactment of the Revenue Act of 1926 furnishes no basis for doubting the validity of the provisions of the statute for judicial review of such decisions.

IV. The practical consequences of denying the jurisdiction of the courts in these cases would be extremely serious.

Some 320 review cases are pending in the Circuit Courts of Appeals. These courts have heretofore decided at least 66 cases on petitions for review of decisions of the Board of Tax Appeals and most of such cases originated on petitions filed with the Board prior to the enactment of the Revenue Act of 1926.

A decision that the Circuit Courts of Appeals have no jurisdiction of these cases, or of a large majority of these cases, would cause great confusion. Taxes have been collected, refunds have been made and collection of deficiencies withheld on the basis of the decisions rendered. If these courts had no jurisdiction their judgments are a nullity and are subject to collateral attack. The unsettling of these decisions would cause great confusion and lead to much litigation.

The Board of Tax Appeals is an important tribunal and an integral part of the machinery provided by Congress for the determination and assessment of income and estate taxes. It has decided many cases and many cases are pending before it involving a large amount of revenue. A decision that the provisions for judicial review of the Board's decisions were invalid would raise grave doubt as to the validity of the pro-

visions establishing the Board and as to the binding effect of its decisions. (*Muskrat* v. *United States* (1911), 219 U. S. 346.) It is unlikely that Congress would have invested the Board with the powers conferred by the Revenue Act of 1926 to make a binding decision as to the Government and the taxpayers without the provision for judicial review. If the provisions establishing the Board are invalid the result undoubtedly would be to burden the District Courts and the Court of Claims with a great mass of litigation which can be much more efficiently handled by the Board of Tax Appeals.

The Government has withheld collection of a large amount of revenue pending the determination of proceedings before the Board of Tax Appeals. The statute of limitations is suspended while such proceedings are pending (Section 274(a), Section 277(b), Revenue Act of 1926). If the provisions for the establishment of the Board of Tax Appeals are unconstitutional, there was no period during which the Commissioner was prohibited from assessing and collecting the taxes, the statute of limitations was not suspended by the pendency of the Board's proceedings and the Government may be barred from collecting hundreds of millions of revenue and may have to refund a large amount of revenue already collected (Section 607, Revenue Act of 1928).

V. The presumption is in favor of the validity of the statute. The statute should be so construed as to avoid grave constitutional doubts.

It is, of course, well settled that the presumption is that acts of Congress are constitutional. *Nicol* v. *Ames* (1899) 173 U. S. 509, 515. *Buttfield* v. *Stranahan* (1904), 192 U. S. 470, 492. *Binns* v. *U. S.* (1904), 194 U. S. 486, 494.

As stated in *Nicol* v. *Ames, supra:*

> "It is always an exceedingly grave and delicate duty to decide upon the constitutionality of an act of the Con-

gress of the United States. The presumption, as has frequently been said, is in favor of the validity of the act, and it is only when the question is free from any reasonable doubt that the court should hold an act of the lawmaking power of the nation to be in violation of that fundamental instrument upon which all the powers of the government rest. This is particularly true of a revenue act of Congress. The provisions of such an act should not be lightly or unadvisedly set aside, although if they be plainly antagonistic to the Constitution it is the duty of the court to so declare. The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive."

Conclusion.

Congress had power under the Constitution to provide for review of decisions of the Board of Tax Appeals by the Circuit Courts of Appeals: this case is properly in the Circuit Court of Appeals of the First Circuit and under Section 239 of the Judicial Code the question certified in this case is properly before the Court.

Respectfully submitted,

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APPENDIX A.

Constitution and Statutes.

1. *Provisions of Constitution of the United States.*

Article III, Section 1:

"The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

Article III, Section 2:

"The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; * * * to controversies to which the United States shall be a party * * *."

Article I, Section 8:

The Congress shall have power to levy and collect taxes, duties, imposts and excises, and to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States * * * to constitute tribunals inferior to the Supreme Court * * * to make all laws which shall be necessary or proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the Government of the United States or in any department or officer thereof.

2. *Provisions of Judicial Code.*

Section 239 as amended. (U. S. C., Title 28, § 346.)

"Certificates of questions by Circuit Courts of Appeals and Court of Appeals of District or Columbia. In any case, civil or criminal, in a Circuit Court of Appeals,

or in the Court of Appeals of the District of Columbia, the court at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which instructions are desired for the proper decision of the cause; and thereupon the Supreme Court may either give binding instructions on the questions or propositions certified, or may require that the entire record in the case be sent up for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there by writ of error or appeal."

3. *Provisions of the Revenue Act of 1926.* (Feb. 26, 1926, c. 27, 44 Stat. 10, U. S. C., Title 26, § 19.)

"Sec. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has been made final. Notwithstanding the provision of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(b) If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from

the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment.

(c) If the taxpayer does not file a petition with the Board within the time prescribed in subdivision (a) of this section, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the collector.

* * * * * *

(e) The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed, if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.

(f) If after the enactment of this Act the Commissioner has mailed to the taxpayer notice of a deficiency as provided in subdivision (a), and the taxpayer files a petition with the Board within the time prescribed in such subdivision, the Commissioner shall have no right to determine any additional deficiency in respect of the same taxable year, except in the case of fraud, and except as provided in subdivision (e) of this section or in subdivision (c) of section 279. If the taxpayer is notified that, on account of a mathematical error appearing upon the face of the return, an amount of tax in excess of that shown upon the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical error, such notice shall not be considered, for the purposes of this subdivision or of subdivision (a) of this section, or of subdivision (d) of section 284, as a notice of a deficiency, and the taxpayer shall have no right to file a petition with the Board based on such

notice, nor shall such assessment or collection be prohibited by the provisions of subdivision (a) of this section.

* * * * * *

(h) For the purposes of this title the date on which a decision of the Board becomes final shall be determined according to the provisions of section 1005."

Sec. 277 * * * (b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter.

Sec. 283. (a) If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or by any such Act as amended, the Commissioner is authorized to send by registered mail to the person liable for such tax notice of the amount proposed to be assessed, which notice shall, for the purpose of this Act, be considered a notice under subdivision (a) of section 274 of this Act. In case of any such determination the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall, except as provided in subdivision (d) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand and the provisions prohibiting claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act.

(b) If before the enactment of this Act any person has appealed to the Board of Tax Appeals under subdivision (a) of section 274 of the Revenue Act of 1924 (if such appeal relates to a tax imposed by Title II of such Act or to so much of an income, war-profits, or excess-profits tax imposed by any of the prior Acts enumerated in subdivision (a) of this section as was not assessed before June 3, 1924), and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section, except as provided in subdivision (j) of this section and except that the person liable for the tax shall not be subject to the provisions of subdivision (d) of section 284.

(c) If before the enactment of this Act the Commissioner has mailed to any person a notice under subdivision (a) of section 274 of the Revenue Act of 1924 (whether in respect of a tax imposed by Title II of such Act or in respect of so much of an income, war-profits or excess-profits tax imposed by any of the prior Acts enumerated in subdivision (a) of this section as was not assessed before June 3, 1924), and if the 60-day period referred to in such subdivision has not expired before the enactment of this Act and no appeal has been filed before the enactment of this Act, such person may file a petition with the Board in the same manner as if a notice of deficiency had been mailed after the enactment of this Act in respect of a deficiency in a tax imposed by this title. In such cases the 60-day period referred to in subdivision (a) of section 274 of this Act shall begin on the date of the enactment of this Act, and the powers, duties, rights, and privileges of the Commissioner and of the person entitled to file the petition, and the jurisdiction of the Board and of the courts, shall, whether or not the petition is filed, be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section.

* * * * * *

(e) If any deficiency in any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, was assessed before June 3, 1924, but was not paid in full before the date of the enactment of this Act, and if the Commissioner, after the enactment of this Act, finally determines the amount of the deficiency, he is authorized to send by registered mail to the person liable for such tax notice of such deficiency, which notice shall, for the purposes of this Act, be considered a notice under subdivision (a) of section 274 of this Act. In the case of any such final determination the amount of the tax, (whether deficiency or interest, penalty, or other addition to the tax) shall, except as provided in subdivision (h) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be collected and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand, and the provisions relating to claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act and in subdivision (i) of this section.

(f) If any deficiency in any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, was assessed before June 3, 1924, but was not paid in full before that date, and if the Commissioner after June 2, 1924, but before the enactment of this Act finally determined the amount of the deficiency, and if the person liable for such tax appealed before the enactment of this Act to the Board and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the Courts, shall be determined, and the computation of the

tax shall be made, in the same manner as provided in subdivision (e) of this section, except as provided in subdivision (j) of this section and except that the person liable for the tax shall not be subject to the provisions of subdivisions (d) of section 284).

(g) If any deficiency in any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, was assessed before June 3, 1924, but was not paid in full before the date of the enactment of this Act, and if the Commissioner after June 2, 1924, finally determined the amount of the deficiency, and notified the person liable for such tax to that effect less than 60 days prior to the enactment of this Act and no appeal has been filed before the enactment of this Act, the person so notified may file a petition with the Board in the same manner as if a notice of deficiency had been mailed after the enactment of this Act in respect of a deficiency in a tax imposed by this title. In such cases the 60-day period referred to in subdivision (a) of section 274 of this Act shall begin on the date of the enactment of this Act, and, whether or not the petition is filed, the powers, duties, rights, and privileges of the Commissioner and of the person, who is so notified, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax be made, in the same manner as provided in subdivision (e) of this section.

* * * * * *

(j) In cases within the scope of subdivision (b) or (f) of this section where any hearing before the Board has been held before the enactment of this Act and the decision is rendered after the enactment of this Act such decision shall, for the purposes of this title, be considered to have become final upon the date when it is rendered and neither party shall have any right to petition for a review of the decision. The Commissioner may, within one year from the time the decision is rendered, begin a proceeding in court for the collection of any part of the amount disallowed by the Board, unless the stat-

utory period of limitations properly applicable thereto has expired before the appeal was taken to the Board. The court shall include in its judgment interest upon the amount thereof in the same cases, at the same rate, and for the same period, as if such amount were collected otherwise than by proceeding in court. In any such proceeding by the Commissioner or in any suit by the taxpayer for a refund, the findings of the Board shall be *prima facie* evidence of the facts therein stated.

* * * * * *

(1) In the case of any income, war-profits, or excess-profits tax imposed by prior Act of Congress, in computing the period of limitations provided in section 277 or 278 of this Act on the making of assessments and the beginning of distraint or a proceeding in court, the running of the statute of limitations shall be considered to have been suspended (in addition to the period of suspension provided for in subdivision (b) of section 277) for any period prior to the enactment of this Act during which the Commissioner was prohibited from making the assessment or beginning distraint or proceeding in court.

Sec. 284. (d) If the Commissioner has mailed to the taxpayer a notice of deficiency under subdivision (a) of section 274 and if the taxpayer after the enactment of this Act files a petition with the Board of Tax Appeals within the time prescribed in such subdivision, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As provided in subdivision (e) of this section or in subdivision (i) of section 279 or in subdivision (b), (f), or (i) of section 283 or in subdivision (d) of section 1001; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

(3) As to any amount collected after the statutory period of limitations upon the beginning of distraint

or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Board which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

(e) If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer as provided in subdivision (a). Such refund or credit shall be made either (1) if claim therefor was filed within the period of limitation provided for in subdivision (b) or (g), or (2) if the petition was filed with the Board within four years after the tax was paid, or, in the case of a tax imposed by this Act, within three years after the tax was paid.

For provisions similar to the above as to the determination of Federal estate taxes see Secs. 308, 310, 318 and 319.

Sec. 1000. Title IX of the Revenue Act of 1924 is amended to read as follows:

"TITLE IX.—BOARD OF TAX APPEALS

"MEMBERSHIP OF BOARD

"Sec. 900. The Board of Tax Appeals (hereinafter referred to as the 'Board') is hereby continued as an independent agency in the Executive Branch of the Government. The Board shall be composed of 16 members; except that such limitation shall not be held applicable to any member holding office under an appointment made before the enactment of the Revenue Act of 1926, in accordance with the law in force prior to the enactment of such Act.

"Sec. 901. (a) Members of the Board shall be appointed by the President, by and with the advice and consent of the Senate, solely on the grounds of fitness to

perform the duties of the office. Members of the Board may be removed by the President, after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause. Each member shall receive salary at the rate of $10,000 per annum.

"(b) The terms of office of all members who are to compose the Board prior to June 2, 1926, shall expire at the close of business on June 1, 1926. The terms of office of the sixteen members first taking office after such date shall expire, as designated by the President at the time of nomination, four at the end of the sixth year, four at the end of the eighth year, four at the end of the tenth year, and four at the end of the twelfth year, after June 2, 1926. The terms of office of all successors shall expire twelve years after the expiration of the terms for which their predecessors were appointed; but any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor.

"Sec. 902. A member of the Board removed from office in accordance with subdivision (a) of section 901 shall not be permitted at any time to practice before the Board.

"Organization and Procedure

"Sec. 903. The Board shall at least biennially designate a member to act as chairman. The Board shall have a seal which shall be judicially noticed.

"Sec. 904. The Board and its divisions shall have such jurisdiction as is conferred on them by Title II and Title III of the Revenue Act of 1926 or by subsequent laws. The Board is authorized to impose a fee in an amount not in excess of $10 to be fixed by the Board for the filing of any petition for the redetermination of a deficiency after the enactment of the Revenue Act of 1926 and for the hearing of any proceeding pending at the time of such enactment.

"Sec. 905. A majority of the members of the Board or of any division thereof shall constitute a quorum for the transaction of the business of the Board or of the division, respectively. A vacancy in the Board or in any division thereof shall not impair the powers nor affect the duties of the Board or division nor of the remaining members of the Board or division, respectively.

"Sec. 906. (a) The chairman may from time to time divide the Board into divisions of one or more members, assign the members of the Board thereto, and in case of a division of more than one member, designate the chief thereof. If a division, as a result of a vacancy or the absence or inability of a member assigned thereto to serve thereon, is composed of less than the number of members designated for the division, the chairman may assign other members to the division or direct the division to proceed with the transaction of business without awaiting any additional assignment of members thereto. A division shall hear and decide any proceeding instituted before the Board and any motion thereon assigned to such division by the chairman.

"(b) In case of a decision by a division, the decision and the findings of fact made in connection therewith shall become the decision and the findings of the Board within 30 days after such decision by the division, unless within such period the chairman has directed that such decision shall be reviewed by the Board.

"(c) If a petition for a redetermination of a deficiency has been filed by the taxpayer, a decision of the Board dismissing the proceeding shall, for the purposes of this title and of the Revenue Act of 1926, be considered as its decision that the deficiency is the amount determined by the Commissioner. An order specifying such amount shall be entered in the records of the Board unless the Board can not determine such amount from the pleadings.

"(d) A decision of the Board shall be held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of

the Board. If the Board dismisses a proceeding and is unable from the pleadings to determine the amount of the deficiency determined by the Commissioner, an order to that effect shall be entered in the records of the Board, and the decision of the Board shall be held to be rendered upon the date of such entry.

"(e) If the assessment or collection of any tax is barred by any statute of limitations, the decision of the Board to that effect shall for the purposes of this title and of the Revenue Act of 1926, be considered as its decision that there is no deficiency in respect of such tax.

"(f) The findings of the Board made in any decision prior to the enactment of the Revenue Act of 1926 shall, notwithstanding the enactment of such Act, continue to be *prima facie* evidence of the facts therein stated.

"Sec. 907. (a) Notice and an opportunity to be heard shall be given to the taxpayer and the Commissioner and a decision shall be made as quickly as practicable. Hearings before the Board and its divisions shall be open to the public and shall be stenographically reported. The Board is authorized to contract for the reporting of such hearings, and in such contract to fix the terms and conditions under which transcripts will be supplied by the contractor to the Board and to other persons and agencies. The proceedings of the Board and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia. The mailing by registered mail of any pleading, order, notice, or process in respect of proceedings before the Board shall be held sufficient service of such pleading, order, notice, or process.

"(b) It shall be the duty of the Board and of each division to make findings of fact and a decision in each case before it, and report thereon in writing; except that the findings of fact and report thereon may be omitted in case of a decision dismissing any proceeding upon

motion either of the taxpayer, the Commissioner, or the Board. Whenever the Board deems it advisable, the report shall contain an opinion in writing in addition to the findings of fact and decision.

"(c) All reports of the Board and all evidence received by the Board and its divisions, including a transcript of the stenographic report of the hearings, shall be public records open to the inspection of the public; except that after the decision of the Board in any proceeding has become final the Board may, upon motion of the taxpayer or the Commissioner, permit the withdrawal by the party entitled thereto of originals of books, documents, and records, and of models, diagrams, and other exhibits, introduced in evidence before the Board or any division; or the Board may, on its own motion, make such other disposition thereof as it deems advisable.

"(d) The Board shall provide for the publication of its reports at the Government Printing Office in such form and manner as may be best adapted for public information and use, and such authorized publication shall be competent evidence of the reports of the Board therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. Such reports shall be subject to sale in the same manner and upon the same terms as other public documents.

"(e) The principal office of the Board shall be in the District of Columbia, but the Board or any of its divisions may sit at any place within the United States The times and places of the meetings of the Board and of its divisions shall be prescribed by the chairman with a view to securing reasonable opportunity to taxpayers to appear before the Board or any of its divisions, with as little inconvenience and expense to taxpayers as is practicable.

"(f) The Secretary of the Treasury shall provide the Board with suitable rooms in courthouses or other build-

ings when necessary for hearings by the Board, or any division thereof, outside the District of Columbia.

"WITNESSES

"Sec. 908. For the efficient administration of the functions vested in the Board or any division thereof, any member of the Board, or any employee of the Board designated in writing for the purpose by the chairman, may administer oaths, and any member of the Board may examine witnesses and require, by subpœna ordered by the Board or any division thereof and signed by the member, (1) the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, documents, correspondence, and other evidence, from any place in the United States at any designated place of hearing, or (2) the taking of a deposition before any designated individual competent to administer oaths under this Act. In the case of a deposition the testimony shall be reduced to writing by the individual taking the deposition or under his direction and shall then be subscribed by the deponent.

"Sec. 909. (a) Any witness summoned or whose deposition it taken under section 908 shall receive the same fees and mileage as witnesses in courts of the United States. Such fees and mileage and the expenses of taking any such deposition shall be paid as follows:

"(1) In the case of witnesses for the Commissioner, such payments shall be made by the Secretary out of any moneys appropriated for the collection of internal-revenue taxes, and may be made in advance.

"(2) In the case of any other witnesses, such payments shall be made, subject to rules prescribed by the Board, by the party at whose instance the witness appears or the deposition is taken.

"(b) This section shall take effect as of June 2, 1924, in the case of fees, mileage, or expenses accrued prior to, but remaining unpaid at the time of, the enactment of the Revenue Act of 1926.

"EXPENDITURES AND PERSONNEL

"Sec. 910. The members of the Board shall receive necessary traveling expenses, and expenses actually in-

curred for subsistence while traveling on duty and away from their designated stations, subject to the same limitations in amount as are now or may hereafter be applicable to the Board of General Appraisers. The employees of the Board shall receive their necessary traveling expenses, and expenses actually incurred for subsistence while traveling on duty and away from their designated stations, in an amount not to exceed $5 per day. The Board is authorized in accordance with the civil service laws to appoint, and in accordance with the Classification Act of 1923 to fix the compensation of, such employees, and to make such expenditures (including expenditures for personal services and rent at the seat of Government and elsewhere, and for law books, books of reference, and periodicals), as may be necessary efficiently to execute the functions vested in the Board. All expenditures of the Board shall be allowed and paid, out of any moneys appropriated for the purposes of the Board, upon presentation of itemized vouchers therefor signed by the chairman. All fees received by the Board shall be covered into the Treasury as miscellaneous receipts. Section 3709 of the Revised Statutes of the United States shall not be construed to apply to any purchase or service rendered for the Board when the aggregate amount involved does not exceed the sum of $25.

"FRIVOLOUS APPEALS TO BOARD

"Sec. 911. Whenever it appears to the Board that proceedings before it have been instituted by the taxpayer merely for delay, damages in an amount not in excess of $500 shall be awarded to the United States by the Board in its decision. Damages so awarded shall be assessed at the same time as the deficiency and shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax."

"Sec. 1001. (a) The decision of the Board rendered after the enactment of this Act (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318) may be reviewed by a Circuit Court of

Appeals, or the Court of Appeals of the District of Columbia, as hereinafter provided, if a petition for such review is filed by either the Commissioner or the taxpayer within six months after the decision is rendered.

(b) Such courts are authorized to adopt rules for the filing of such petition, the preparation of the record for review, and the conduct of proceedings upon such review and, until the adoption of such rules, the rules of such courts relating to appellate proceedings upon a writ of error, so far as applicable, shall govern.

(c) Despite the provisions of sections 274 and 308, such review shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Board unless a petition for review in respect of such portion is filed by the taxpayer, and then only if the taxpayer (1) on or before the time his petition for review is filed (and in any event before the expiration of six months after the decision of the Board is rendered) has filed with the Board a bond in a sum fixed by the Board not exceeding double the amount of the portion of the deficiency in respect of which the petition for review is filed, and with surety approved by the Board, conditioned upon the payment of the deficiency as finally determined, together with any interest, additional amounts or additions to the tax provided for by law, or (2) has filed a jeopardy bond under Title II or Title III of the Revenue Act of 1924 or of this Act. It as a result of a waiver under subdivision (d) of section 274 or subdivision (d) of section 308 any part of the amount determined by the Board is paid after the filing of the review bond such bond shall, at the request of the taxpayer, be proportionately reduced.

(d) In cases where assessment or collection has not been stayed by the filing of a bond, then if the amount of the deficiency determined by the Board is disallowed in whole or in part by the court, the amount so disallowed shall be credited or refunded to the taxpayer, or, if collection has not been made, shall be abated.

(e) Nothing in subdivision (c) shall be construed as relieving the petitioner from making or filing such undertakings as the court may require as a condition of or in connection with the review."

"VENUE

"Sec. 1002. Such decision may be reviewed—

(a) In the case of an individual, by the Circuit Court of Appeals for the circuit whereof he is an inhabitant, or if not an inhabitant of any circuit, then by the Court of Appeals of the District of Columbia.

(b) In the case of a person (other than an individual), except as provided in subdivision (c), by the Circuit Court of Appeals for the circuit in which is located the office of the collector to whom such person made the return, or in case such person made no return, then by the Court of Appeals of the District of Columbia.

(c) In the case of a corporation which had no principal place of business or principal office or agency in the United States, then by the Court of Appeals of the District of Columbia.

(d) In the case of an agreement between the Commissioner and the taxpayer, then by the Circuit Court of Appeals for the circuit, or the Court of Appeals of the District of Columbia, as stipulated in such agreement.

"JURISDICTION

"Sec. 1003. (a) The Circuit Courts of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board (except as provided in section 239 of the Judicial Code, as amended); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended.

(b) Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accord-

ance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require."

"Sec. 1004. (a) The Circuit courts of Appeals, the Court of Appeals of the District of Columbia, and the Supreme Court shall have power to impose damages in any case where the decision of the Board is affirmed and it appears that the petition was filed merely for delay.

(b) The Board is authorized to fix a fee, not in excess of the fee fixed by law to be charged and collected therefor by the clerks of the district courts, for comparing, or for preparing and comparing a transcript of the record."

"DATE ON WHICH BOARD'S DECISION BECOMES FINAL

"Sec. 1005. (a) The decision of the Board shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; or

(4) Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed.

(b) If the Supreme Court directs that the decision of the Board be modified or reversed, the decision of the Board rendered in accordance with the mandate of the

Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(c) If the decision of the Board is modified or reversed by the Circuit Court of Appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered in accordance with the mandate of the Circuit Court of Appeals shall become final on the expiration of 30 days from the time of such decision of the Board was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(d) If the Supreme Court orders a rehearing; or if the case is remanded by the Circuit Court of Appeals to the Board for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the decision of the Board rendered upon such rehearing shall become final in the same manner as though no prior decision of the Board had been rendered.

(e) As used in this section—

(1) The term 'Circuit Court of Appeals' includes the Court of Appeals of the District of Columbia;

(2) The term 'mandate,' in case a mandate has been recalled prior to the expiration of 30 days from the date of issuance thereof, means the final mandate."

4. *Provisions of Revenue Act of 1928* (Act May 29, 1928, c. 852, 45 Stat. 795, U. S. C. Title 26, c. 24.)

"SEC. 504. SUSPENSION OF RUNNING OF STATUTE OF LIMITATIONS.

(a) Section 277 (b) of the Revenue Act of 1926 is amended to read as follows:

'(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Board, until the decision of the Board becomes final), and for 60 days thereafter.'

(b) Subsection (a) of this section shall apply in all cases where the period of limitation has not expired prior to the enactment of this Act."

SEC. 507. OVERPAYMENTS FOUND BY BOARD OF TAX APPEALS.

Section 284(e) of the Revenue Act of 1926 is amended to read as follows:

'(e) If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer as provided in subdivision (a). Unless claim for credit or refund, or the petition, was filed within the time prescribed in subdivision (g) for filing claims, no such credit or refund shall be made of any portion of the tax paid more than four years (or,

in the case of a tax imposed by this title, more than three years) before the filing of the claim or the filing of the petition, whichever is earlier.' "

SEC. 601. BOARD OF TAX APPEALS—PROCEDURE.

Sections 906 and 907(a) and (b) of the Revenue Act of 1924, as amended, are further amended to read as follows:

'Sec. 906. (a) The chairman may from time to time divide the Board into divisions of one or more members, assign the members of the Board thereto, and in case of a division of more than one member, designate the chief thereof. If a division, as a result of a vacancy or the absence or inability of a member assigned thereto to serve thereon, is composed of less than the number of members designated for the division, the chairman may assign other members to the division or direct the division to proceed with the transaction of business without awaiting any additional assignment of members thereto. A division shall hear, and make a determination upon, any proceeding instituted before the Board and any motion in connection therewith, assigned to such division by the chairman, and shall make a report of any such determination which constitutes its final disposition of the proceeding.

'(b) The report of the division shall become the report of the Board within 30 days after such report by the division, unless within such period the chairman has directed that such report shall be reviewed by the Board. Any preliminary action by a division which does not form the basis for the entry of the final decision shall not be subject to review by the Board except in accordance with such rules as the Board may prescribe. The report of a division shall not be a part of the record in any case in which the chairman directs that such report shall be reviewed by the Board.

'(c) If a petition for a redetermination of a deficiency has been filed by the taxpayer, a decision of the Board dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined

by the Commissioner. An order specifying such amount shall be entered in the records of the Board unless the Board can not determine such amount from the record in the proceeding, or unless the dismissal is for lack of jurisdiction.

'(d) A of the Board (except a decision dismissing a proceeding for lack of jurisdiction) shall be held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of the Board. If the Board dismisses a proceeding for reasons other than lack of jurisdiction and is unable from the record to determine the amount of the deficiency determined by the Commissioner, or if the Board dismisses a proceeding for lack of jurisdiction, an order to that effect shall be entered in the records of the Board, and the decision of the Board shall be held to be rendered upon the date of such entry.

'(e) If the assessment or collection of any tax is barred by any statute of limitations, the decision of the Board to that effect shall be considered as its decision that there is no deficiency in respect of such tax.

'(f) The findings of the Board made in connection with any decision prior to the enactment of the Revenue Act of 1926 shall, notwithstanding the enactment of such Act, continue to be *prima facie* evidence of the facts therein stated.

'Sec. 907. (a) Notice and opportunity to be heard upon any proceeding instituted before the Board shall be given to the taxpayer and the Commissioner, and a report upon the proceeding and a decision thereon shall be made as quickly as practicable. The decision shall be made by a member in accordance with the report of the Board, and such decision so made shall, when entered, be the decision of the Board. If an opportunity to be heard upon the proceeding is given before a division of the Board, neither the taxpayer nor the Commissioner shall be entitled to notice and opportunity to be heard before the Board upon review, except upon a specific order of the chairman. Hearings before the Board and its divisions shall be open to the public, and the testi-

mony, and, if the Board so requires, the argument shall be stenographically reported. The Board is authorized to contract (by renewal of contract or otherwise) for the reporting of such hearings, and in such contract to fix the terms and conditions under which transcripts will be supplied by the contractor to the Board and to other persons and agencies. The proceedings of the Board and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia. In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, where no hearing has been held before the enactment of the Revenue Act of 1928, the burden of proof in respect of such issue shall be upon the Commissioner. The mailing by registered mail of any pleading, decision, order, notice, or process in respect of proceedings before the Board shall be held sufficient service of such pleading, decision, order, notice, or process.

'(b) It shall be the duty of the Board and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Board shall report in writing all its findings of fact, opinions and memorandum opinions.'"

"SEC. 603. BOARD OF TAX APPEALS—COURT REVIEW OF DECISION.

Subdivisions (c) and (d) of section 1001 of the Revenue Act of 1926 are amended to read as follows:

'(c) Notwithstanding any provision of law imposing restrictions on the assessment and collection of deficiencies, such review shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Board unless a petition for review in respect of such portion is duly filed by the taxpayer, and then only if the taxpayer (1) on or before the time his petition for review is filed has filed with the Board a bond in a sum fixed by the Board not exceeding double the amount of the portion of the deficiency in

respect of which the petition for review is filed, and with surety approved by the Board, conditioned upon the payment of the deficiency as finally determined, together with any interest, additional amounts, or additions to the tax provided for by law, or (2) has filed a jeopardy bond under the income or estate tax laws. If as a result of a waiver of the restrictions on the assessment and collection of a deficiency any part of the amount determined by the Board is paid after the filing of the review bond, such bond shall, at the request of the taxpayer, be proportionately reduced.

'(d) In cases where assessment or collection has not been stayed by the filing of a bond, then if the amount of the deficiency determined by the Board is disallowed in whole or in part by the court, the amount so disallowed shall be credited or refunded to the taxpayer, without the making of claim therefor, or, if collection has not been made, shall be abated.' "

5. *Provisions of Revenue Act of 1924*, (June 2, 1924, c. 234, 43 Stat. 254.)

"Sec. 274. (a) If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900.

(b) If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the Board shall be assessed, but a proceeding in court may be begun, without assessment, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for

the payment of the tax to the date of the judgment. Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 277 has expired.

(c) If the taxpayer does not file an appeal with the Board within the time prescribed in subdivision (a) of this section, the deficiency of which the taxpayer has been notified shall be assessed, and shall be paid upon notice and demand from the collector."

"Sec. 277. (b) The period within which an assessment is required to be made by subdivision (a) of this section in respect of any deficiency shall be extended (1) by 60 days if a notice of such deficiency has been mailed to the taxpayer under subdivision (a) of section 274 and no appeal has been filed with the Board of Tax Appeals, or, (2) if an appeal has been filed, then by the number of days between the date of the mailing of such notice and the date of the final decision by the Board."

"TAXES UNDER PRIOR ACTS.

Sec. 280. If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by this title, except as otherwise provided in section 277."

"TITLE IX.—BOARD OF TAX APPEALS.

Sec. 900. (a) There is hereby established a board to be known as the Board of Tax Appeals (hereinafter referred to as the 'Board'). The Board shall be com-

posed of seven members, except that for a period of two years after the enactment of this Act the Board shall be composed of such number of members, not more than twenty-eight, as the President determines to be necessary.

(b) Each member of the Board shall be appointed by the President, by and with the advice and consent of the Senate, solely on the grounds of fitness to perform the duties of the office. The term of office of all members who are to compose the Board during the period of two years after the enactment of this Act, shall expire at the end of such period. The terms of office of the first seven members who are thereafter to compose the Board shall expire, two at the end of the fourth year, two at the end of the sixth year, two at the end of the eighth year, and one at the end of the tenth year, after the expiration of such two-year period. The term of office of each such member shall be designated by the President, and the terms of office of their successors shall expire ten years after the expiration of their predecessors' terms, except that any individual appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor, and a member in office at the expiration of the term for which he was appointed may continue in office until his successor is qualified. Any member of the Board may be removed by the President for inefficiency, neglect of duty, or malfeasance in office, but for no other reason. Each member shall receive a salary at the rate of $7,500 per annum.

(c) No member of the Board appointed for a term beginning after the expiration of two years after the enactment of this Act shall be permitted to practice before the Board or any official of the Bureau of Internal Revenue for a period of two years after leaving office.

(d) The Board shall at least biennially designate a member to act as chairman. The Board shall have a seal which shall be judicially noticed.

(e) The Board and its divisions shall hear and determine appeals filed under sections 274, 279, 308, and 312. A majority of the members of the Board or of any

division thereof shall constitute a quorum for the transaction of the business of the Board or of the division, respectively. A vacancy in the Board or in any division thereof shall not impair the powers nor affect the duties of the Board or division, nor of the remaining members of the Board or division, respectively.

(f) The chairman may from time to time divide the Board into divisions and assign the members thereto, and designate a chief thereof. If a division, as a result of a vacancy or the absence or inability of a member assigned thereto to serve thereon, is composed of less than three members, the chairman may assign other members thereto, or he may direct the division to proceed with the transaction of business. A division shall hear and determine appeals filed with the Board and assigned to such division by the chairman. Upon the expiration of thirty days after a decision by a division, such decision, and the findings of fact made in connection therewith, shall become the final decision and findings of the Board, unless within such period the chairman has directed that such decision shall be reviewed by the Board.

(g) In any proceeding in court under sections 274, 279, 308, or 312, and in any suit or proceeding by a taxpayer to recover any amounts paid in pursuance of a decision of the Board, the findings of the Board shall be *prima facie* evidence of the facts therein stated.

(h) Notice and an opportunity to be heard shall be given to the taxpayer and the Commissioner and a decision shall be made as quickly as practicable. Hearings before the Board and its divisions shall be open to the public. The proceedings of the Board and its divisions shall be conducted in accordance with such rules of evidence and procedure as the Board may prescribe. It shall be the duty of the Board and of each division to make a report in writing of its findings of fact and decision in each case, and a copy of its report shall be entered of record and a copy furnished the taxpayer. If the amount of tax in controversy is more than $10,000 the oral testimony taken at the hearing shall be reduced to writing

and the report shall contain an opinion in writing in addition to the findings of fact and decision. All reports of the Board and its divisions and all evidence received by the Board and its divisions (including, in cases where the oral testimony is reduced to writing, the transcript thereof) shall be public records open to the inspection of the public. The Board shall provide for the publication of its reports at the Government Printing Office in such form and manner as may be best adapted for public information and use, and such authorized publication shall be competent evidence of the reports of the Board therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. Such reports shall be subject to sale in the same manner and upon the same terms as other public documents. The principal office of the Board shall be in the District of Columbia, but the Board or any of its divisions may sit at any place within the United States. The times and places of the meetings of the Board, and of its divisions, shall be prescribed by the chairman with a view to securing reasonable opportunity to taxpayers to appear before the Board or any of its divisions, with as little inconvenience and expense to taxpayers as is practicable.

(i) For the efficient administration of the functions vested in the Board or any division thereof, any member of the Board may administer oaths, examine witnesses, and require, by subpœna ordered by the Board or any division thereof and signed by the member, (1) the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, documents, correspondence, and other evidence, from any place in the United States at any designated place of hearing, (2) the taking of a deposition before any designated individual competent to administer oaths under this Act, and (3) the answer in writing under oath to any question of fact submitted. In the case of a deposition the testimony shall be reduced to writing by the individual taking the deposition or under his direction and shall then be subscribed by the deponent. Any witnesses sum-

moned or whose deposition is taken under this subdivision shall be paid the same fees and mileage as are paid witnesses in the courts of the United States.

(j) The Secretary shall furnish the Board with such clerical assistance, quarters, stationery, furniture, office equipment, and other supplies as may be necessary for the efficient execution of the functions vested in it by this section.

(k) The members and employees of the Board and employees assigned thereto shall receive their necessary traveling expenses, and their actual expenses incurred for subsistence while traveling on duty and away from their designated stations in an amount not to exceed $7 per day in the case of members, and $4 per day in the case of employees. The Board is authorized in accordance with the civil service laws to appoint, and in accordance with the Classification Act of 1923 to fit the compensation of, such employees, and to make such expenditures, including expenditures for personal services and rent at the seat of the government and elsewhere and for law books, books of reference, and periodicals, as may be necessary efficiently to execute the functions vested in the Board, in case such assistants and such expenditures are not suitably provided for by the Secretary under subdivision (j). All expenditures of the Board shall be allowed and paid upon the presentation of itemized vouchers therefor, signed by the chairman, out of any moneys appropriated for the collection of internal-revenue taxes and allotted to the Board, or out of any moneys specifically appropriated for the purpose of the Board. The Board shall be an independent agency in the executive branch of the Government.

APPENDIX B.

List of cases in which Circuit Courts of Appeals have entertained jurisdiction of appeals from the United States Board of Tax Appeals. In all cases where the docket number in the Board of Tax Appeals is lower than 12,343, the petition was filed with the Board prior to February 26, 1926, the date of the enactment of the Revenue Act of 1926.

FIRST CIRCUIT

		Docket No. B. T. A.
Blair *v.* Barton	26 Fed. 2nd 765	12934
Commissioner of Internal Revenue *v.* Old Colony Railroad	26 Fed. 2nd 408 (Certiorari granted Oct. 22, 1928, 731 Ed. 78).	7820
Hamilton *v.* Commissioner of Internal Revenue	24 Fed. 2nd 668	6844
Rhode Island Hospital Trust Co. *v.* Commissioner of Internal Revenue	Decided November 27, 1928	7913

SECOND CIRCUIT

DeLoss *v.* Commissioner of Internal Revenue	28 Fed. 2nd 803	7588
Fraser *v.* Commissioner of Internal Revenue	25 Fed. 2nd 653	6495
Hardwick Realty Co., Inc. *v.* Commissioner of Internal Revenue	Decided December, 1928	10498
The Oswego & Syracuse Railroad Co. *v.* Commissioner of Internal Revenue	Decided November, 1928	8157
Tootal Broadhurst Lee Co. Ltd. *v.* Commissioner of Internal Revenue	Decided January, 1929.	15962

THIRD CIRCUIT

		Docket No. B. T. A.
Bishoff *v.* Commissioner of Internal Revenue	27 Fed. 2nd 91	3993
Saunders *v.* Commissioner of Internal Revenue	Decided Dec. 12, 1928.	10526
Thomas Cronin Co. *v.* Commissioner of Internal Revenue	Docket No. 3880, October Term, 1928	7995
Thompson *v.* Commissioner of Internal Revenue	28 Fed. 2nd 247	6523
Weaver *v.* Blair	19 Fed. 2nd 16	17015

FOURTH CIRCUIT

Gauley Mountain Coal Co. *v.* Commissioner of Internal Revenue	23 Fed. 2nd 574	1463
Kleeson Co. *v.* Blair	28 Fed. 2nd 557	7050; 19116
Lavenstein Corporation *v.* Commissioner of Internal Revenue	25 Fed. 2nd 375	7221
MacCorkle *v.* Commissioner of Internal Revenue	26 Fed. 2nd 247	10912
Wheeling Tile Co. *v.* Commissioner of Internal Revenue	25 Fed. 2nd 455	8733

FIFTH CIRCUIT

Avery *v.* Commissioner of Internal Revenue	22 Fed. 2nd 6	4788
Blair *v.* Mathews Mathews *v.* Blair	Decided Dec. 20, 1928.	9583
Brown *v.* Commissioner of Internal Revenue	22 Fed. 2nd 797	5633; 5634
Carr *v.* Commissioner of Internal Revenue Lee *v.* Commissioner of Internal Revenue	28 Fed. 2nd 551	7403; 7404

		Docket No. B. T. A.
Daniel Brothers Co. *v.* Commissioner of Internal Revenue	28 Fed. 2nd 761	10840
Harry S. Kaufman, Ltd. *v.* Commissioner of Internal Revenue	24 Fed. 2nd 44	8154; 11845
Howard *v.* Commissioner of Internal Revenue	Decided Dec. 20, 1928.	9384
New Orleans Shipwright Co., Ltd. *v.* Commissioner of Internal Revenue	27 Fed. 2nd 214	228; 876; 5111
Reinschmidt *v.* Commissioner of Internal Revenue	28 Fed. 2nd 660	4681
Richmond Hosiery Mills *v.* Commissioner of Internal Revenue	29 Fed. 2nd 262	7763; 3703
S. G. Sample Co., Ltd. *v.* Commissioner of Internal Revenue	23 Fed. 2nd 671	9272
Southport Mill, Ltd. *v.* Commissioner of Internal Revenue	26 Fed. 2nd 17	1676
Zimmern *v.* Commissioner of Internal Revenue	28 Fed. 2nd 769	9951

SEVENTH CIRCUIT

Arthur R. Jones Syndicate *v.* Commissioner of Internal Revenue	23 Fed. 2nd 833	8343
Buttolph *v.* Commissioner of Internal Revenue	Decided Nov. 28, 1928.	6027
Chicago Railway Equipment Co. *v.* Blair	20 Fed. 2nd 10	3964
Dilks *v.* Blair	23 Fed. 2nd 831	12115
Greengard *v.* Commissioner of Internal Revenue	Decided Nov. 30, 1928.	7716

		Docket No. B. T. A.
Kosmerl *v.* Commissioner of Internal Revenue	25 Fed. 2nd 87	8875
Mandel *v.* Blair	26 Fed. 2nd 1019	8633
Metropolitan Business College *v.* Blair	24 Fed. 2nd 176	5717
Reliance Manufacturing Co. *v.* Blair	19 Fed. 2nd 789	16016
Scott *v.* Commissioner of Internal Revenue	Decided Dec. 13, 1928.	10773
The Great Lakes Hotel Corporation *v.* Commissioner of Internal Revenue	Decided Dec. 20, 1928.	1952
The North American Railway Construction Co. *v.* Commissioner of Internal Revenue	27 Fed. 2nd 493	3167
W. S. Bogle & Co., Inc. *v.* Commissioner of Internal Revenue	26 Fed. 2nd 771	2208

EIGHTH CIRCUIT

Conklin-Zonne-Loomis Co. *v.* Commissioner of Internal Revenue	Decided Nov. 24, 1928.	7223; 13461
Denver Live Stock Commission Co. *v.* Commissioner of Internal Revenue	Decided Nov. 24, 1928.	4527
Kendrick Coal & Dock Co. *v.* Commissioner of Internal Revenue	Decided Nov. 7, 1928.	6806
Mastin *v.* Commissioner of Internal Revenue	28 Fed. 2nd 748	3425; 20834
Minnehaha National Bank of Sioux Falls, S. D. *v.* Commissioner of Internal Revenue	28 Fed. 2nd 763	10599
Ruth Iron Co. *v.* Commissioner of Internal Revenue	26 Fed. 2nd 30	7224

NINTH CIRCUIT

		Docket No. B. T. A.
Blair *v.* Roth	22 Fed. 2nd 932 (Certiorari denied April 23, 1928; 277 U. S. 588)	6012
Lassen Lumber & Box Co. *v.* Blair	27 Fed. 2nd 17	3431
Royal Packing Co. *v.* Commissioner of Internal Revenue	22 Fed. 2nd 536	3962

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

Ayer, Charles V. *v.* Blair	26 Fed. 2nd 547	6442
Ayer, Frederick *v.* Blair	25 Fed. 2nd 534	8184
Cuyahoga Abstract Title & Trust Co. *v.* Commissioner of Internal Revenue	Decided November 5, 1928	8937
Deering, *et al.*, Executors *v.* Blair	23 Fed. 2nd 975	2299; 16651
Joy Floral Co. *v.* Commisisoner of Internal Revenue	Decided December 3, 1928	8986
Lewis-Hall Iron Works *v.* Blair	23 Fed. 2nd 972 (Certiorari denied May 14, 1928; 277 U. S. 592)	3097
News Publishing Co. *v.* Blair	Decided December 3, 1928	8078
T. B. Hord Grain Co. *v.* Blair	25 Fed. 2nd 536 (Certiorari denied October 15, 1928; 73 L. Ed. 25)	2398; 7291

	Docket No. B. T. A.
The George Feick & Sons Co. *v.* Blair.....26 Fed. 2nd 540.....	8796; 13757; 18644
Wells Fargo Bank & Union Trust Co., *et al.*, Executors, *v.* Blair, Gollober *v.* Blair...26 Fed. 2nd 532.....	3092; 3093
Whitcomb *v.* Blair.....25 Fed. 2nd 528.....	5854
W. K. Henderson Iron Works & Supply Co. *v.* Blair.....25 Fed. 2nd 528.....	518; 3555; 10501.

In the following cases the Circuit Courts of Appeals denied jurisdiction of appeals from the United States Board of Tax Appeals solely on the ground that the hearing had taken place prior to February 26, 1926 (See Section 1001 (a) and Sections 283 (j) and 318 (h) Revenue Act of 1926):

Blair *v.* Curran.....24 Fed. 2nd 390..... (C. C. A. 1st Circuit)	793
Blair *v.* Hendricks.....24 Fed. 2nd 819..... (C. C. A. 2nd Circuit)	4554
Red Wing Linseed Co. *v.* Blair.29 Fed. 2nd 253..... (C. C. A. 8th Circuit)	2862
Siegel *v.* Blair.....25 Fed. 2nd 1022..... (C. C. A. 8th Circuit)	5255
T. C. Power & Brothers Co. *v.* Commisisoner of Internal Revenue .....27 Fed. 2nd 116..... (C. C. A. 9th Circuit)	3740

APPENDIX C.

Opinion Upon Special Judicial Tribunals.

[The following opinion, prepared for the Judiciary Committee of the House of Representatives, was inserted in the Congressional Record by the Chairman of that Committee in connection with the consideration by the House of legislation transferring jurisdiction of patent appeals from the District of Columbia Court of Appeals to the Court of Customs Appeals. It appears in 68 Cong. Rec. pp. 3181-2.]

Congress exercises the function of creating courts under several different grants of power. It is expressly given the power of creating inferior courts to the Supreme Court of the United States in the administration of Federal justice under the grant of Article III of the Constitution. These courts exercise jurisdiction within the borders of each State in all cases described in the third article as judicial power extended by that article to the United States. Congress may create courts to exercise complete jurisdiction over the District of Columbia, as given it by reason of the exclusive governmental jurisdiction that it has over the District vested expressly by the Constitution. Congress may in the same way create courts to exercise complete and exclusive judicial jurisdiction over the Territories of the United States under that provision of the Constitution which gives Congress the right to impose needful regulations over the territory and property of the United States. This latter power is also said by Chief Justice Marshall and others to grow out of the power of the United States as a sovereign to govern the territory which it owns, not in the States. In the same way it may be properly said that were there no third article to the Constitution, the United States as a sovereign Government could create courts to decide cases arising between it and private individuals, to construe and decide questions arising between the Government and such individuals in reference to its own taxes, its

own grants, and in reference to its own debts. In other words, I conceive that without the special grant of power under the third article of the Constitution Congress could exercise the power of a sovereign, create a court of claims to pass on the debts which the United States may owe to individuals, on grants of lands which it may have granted to individuals, to grants of patent rights which it may have granted to individuals, and the construction and decision of cases arising under the customs or internal revenue laws affecting the payment of the revenue which a sovereign must collect in order that it may live. With reference to these latter courts, it may be said that the same rigid rule would not be applied to the functions which Congress may give to them as to whether they shall be purely judicial or not, as has been applied in respect to courts that exercise a Federal jurisdiction under the third article of the judicial power of the United States, as distinguished from the general administration of justice by the States within State borders, which could not exist but for the third article. In this way the Court of Claims, the Court of Customs Appeals, and a court of patents may be easily distinguished from the Supreme Court and its subordinate courts under the third article in respect to limitation to strictly judicial functions.

The Supreme Court and the subordinate courts of the United States, exercising jurisdiction within the several States of the Union, all deal with cases and controversies in the sense of the third article of the Constitution, but as to courts which are not concerned with the exercise of judicial power within or affecting the several States, there is reason to believe that they stand on a different plane, and that as they are brought into being and exist in virtue of the sovereignty of the United States, and of its power to do all that is essential to the effective exercise of a government, such as aiding in the enforcement of the taxation laws, aiding in the administration and enforcement of the public land laws and the Indian laws, and in the ascertainment and determination of claims against the United States and the administra-

tion of the laws relating to the granting of patents, copyrights, and trade-marks, they may be invested with jurisdiction and powers which lie outside of and beyond the controversies and cases which are comprehended by the third article of the Constitution. Illustrations of this will be found in the court of private-land claims, which for many years ascertained and reported the facts respecting conflicting claims to lands jurisdiction over which was ceded to the United States by Mexico, to the special Indian court, which dealt with claims to citizenship of the Five Civilized Tribes in the Indian Territory when Congress was preparing that region for admission to the Union as a State, to the Court of Claims, and especially its power and authority to examine and report on claims, at the instance of either House of Congress or at the instance of any of the executive departments of the Government. In *Gordon* v. *United States* (117 U. S. Appendix 697, 699), Chief Justice Taney said:

> "So far as the Court of Claims is concerned, we see no objection to the provisions of this law, Congress may undoubtedly establish tribunals with special powers to examine testimony and decide, in the first instance, upon the validity and justice of any claim for money against the United States, subject to the supervision and control of Congress or a head of any of the executive departments."

And while in that and other cases it is held that where the action of such a tribunal is intended to be advisory only, and in aid of legislative or administrative action, there can be no review by the Supreme Court, the cases all recognize that Congress, consistently with the Constitution, may establish special tribunals and clothe them with power to ascertain and decide facts and report them as a basis for legislative or administrative action, without putting them in the form of a controlling judicial judgment.

The case of the *Postum Cereal Co.* v. *California Fig-Nuts Co.*, decided January 3, 1927, following the case of *Keller* v. *The Potomac Electric Power Co.* (261 U. S. 428), which in

turn followed the case of *Baldwin* v. *Howard* (256 U. S. 35), and *Muskrat* v. *United States* (219 U. S. 346), were cases in which the jurisdiction of the Supreme Court of the United States was in question, and it was held that its power and jurisdiction as a court was limited to judicial cases and controversies and could not extend to mere decisions as by a commission or special tribunal created for the purpose of aiding governmental functions, whether legislative or administrative. But these cases would not apply to a Court of Customs and Patent Appeals, to whose jurisdiction Congress may properly add the duties of an administrative tribunal for governmental purposes.

APPENDIX D.

Extracts from Reports of Congressional Committees Relating to the Board of Tax Appeals.

1. REVENUE ACT OF 1926—EXTRACT FROM REPORT OF THE COMMITTEE ON WAYS AND MEANS, HOUSE REPORT NO. 1, 69TH CONGRESS, PAGES 17-21

TITLE X. BOARD OF TAX APPEALS.

The provisions of the revenue act of 1924 creating the Board of Tax Appeals are continued in force with numerous amendments. The board constitutes an impartial tribunal of experts, independent of the Treasury Department, readily available for the determination of tax liabilities as between the Government and the taxpayer. The work of the board has been uniformly praised by taxpayers, tax attorneys, and the Treasury Department. Representatives of the American Bar Association informed the committee that the board functions speedily and definitely, is unhampered by questions of administrative expedience, and renders decisions that are uniformly independent.

* * * * * * *

COURT REVIEW—VENUE.—Under section 912 of the proposed new law the taxpayer is given the right to obtain a review of the board's decision (whether determining a deficiency, dismissing on motion a petition, or assessing damages for frivolous appeal) by the Circuit Court of Appeals of the United States or the Court of Appeals of the District of Columbia. The venue on review in any particular case is designated as follows: (1) In the case of an individual the test is the same as for venue under section 51 of the Judicial Code, except that in the case of the nonresident individual, the decision will be reviewed by the Court of Appeals of the District of Columbia; (2) in the case of partnerships, associations, corporations, trusts, and estates, the review will be

given by the court for the circuit in which is located the office of the collector to whom the return was made, a provision similar to that for venue in suits for refunds; and (3) in the case of nonresident or foreign corporations, the Court of Appeals of the District of Columbia will review the decision. The above provisions as to venue relieve the difficulties involved in joint returns and determination of the principal place of business, and further prevent undue burden upon those circuits embracing States in which a vast number of corporations are organized.

COURT REVIEW.—QUESTIONS OF FACT AND LAW.—The procedure is made to conform as nearly as may be to the procedure in the case of an original action in a Federal district court. Inasmuch as the complicated and technical facts governing tax liability require a determination by a body of experts, the review is taken directly to an appellate court, just as, for instance, in the case of orders of the Federal Trade Commission, and orders of the Secretary of Agriculture under the packers and stockyards act. In view of the grant of exclusive power to the board finally to determine the facts upon which tax liability is based, subdivision (b) of section 914 limits the review on appeal to what are commonly known as questions of law. The court upon review may consider, for example, questions as to the constitutionality of the substantive law applied, the constitutionality of the procedure used, failure to observe the procedure required by law, the proper interpretation and application of the statute or any regulation having the force of law, the existence of at least some evidence to support the findings of fact, and the validity of any ruling upon the admissibility of evidence (see subdivision (a) of section 907 and subdivision (b) of section 914). The court, therefore, may adequately control the action of the administrative officer or agency, but will not be burdened with the duty of substituting its opinion for that of the board upon the evidence.

In the view of the committee the decisions of the board are judicial and not legislative or administrative determina-

tions. Review of judicial decisions may be had by direct appeal to the courts as well as by petitions to the courts for the enforcement of an administrative order, or by extraordinary remedy and suits for refunds. Further, no rehearing need be provided before the reviewing court, and the review of the decision of the board may be limited to the record made before the board. The imposition upon the court of the duty of reviewing judicial decisions, such as those of the board, is not the imposition of a nonjudicial duty, by reason of the fact that the execution of the decision is dependent upon the administrative action of the commissioner in assessing and collecting the tax in accordance with the decision.

The duty imposed upon the commissioner in respect of the deficiency decided is not discretionary but nondiscretionary, and the performance of the duty in accordance with law is mandatory. Such review of a judicial as distinguished from a legislative or administrative determination may be had as to either questions of law or of fact. The proposed procedure, however, for reasons of policy and not of law, limits court review solely to questions of law as heretofore described. The above principles are of general application and are not limited merely to matters over which Congress has peculiar control by reason of a proprietary interest, as in public lands or pensions, or by reason of an exclusive regulatory power, such as in the importation of merchandise and the admission of aliens, and in adhering to such principles the committee feels that it is establishing an appellate procedure that is unquestionably constitutional.

COURT REVIEW—RULES OF PROCEDURE.—The proceedings on review will be conducted in accordance with rules adopted by the several courts of review. The committee is convinced that it is highly desirable that the rules be as uniform as possible. In a desire not to impose a further burden upon the Supreme Court of the United States, the committee has decided to rely upon the possibility of action by the confer-

ence of circuit judges and upon recommendations submitted to the Circuit Courts of Appeals by the board to secure this uniformity.

COURT REVIEW—FINALITY OF DECISIONS.—Section 916 prescribes the date on which a decision of the board (whether or not appeal thereon is had) is to become final. Inasmuch as the statute of limitations upon assessments and suits for collection, both of which are suspended during review of the commissioners' determination, commences to run upon the day upon which the board's decision becomes final, and inasmuch as the power to make a jeopardy assessment terminates upon the commencement of proceedings to review a decision of the board, it is of utmost importance that this time be specified as accurately as possible. In some instances in order to achieve this result the usual rules of law applicable in court procedure must be changed. For example, the power of the court of review to recall its mandate is made to expire 30 days from the date of issuance of the mandate.

2. REVENUE ACT OF 1926—EXTRACTS FROM REPORT OF THE COMMITTEE ON FINANCE, SENATE REPORT NO. 52, 69TH CONGRESS.

The report of the Committee on Finance contains substantially the same statements as quoted above from the report of the Committee on Ways and Means, except for modifications and additions shown by the following extracts, and by the extracts hereinafter quoted from the House Conference Statement.

(p. 36) COURT REVIEW—QUESTIONS OF FACT AND LAW.—

* * *

(p. 37) In the view of the committee the decisions of the board are judicial and not legislative or administrative determinations. Review of judicial decisions may be had by direct appeal to the courts (which is the method provided in this bill), and such appeal may be (and is by this bill) made exclusive of other methods, such as by petitions to the courts

for the enforcement of an administrative order, or by extraordinary remedy such as injunction, or by suits for refunds. Further, the review of the decision of the board may be limited to the record made before the board.

The imposition upon the court of the duty of reviewing judicial decisions, such as those of the board, can not properly be urged as the imposition of a nonjudicial duty, by reason of the fact that the execution of the decision is dependent upon the administrative action of the commissioner in assessing and collecting the tax in accordance with the decision. The duty imposed upon the commissioner in respect of the deficiency decided is not discretionary but nondiscretionary, but its performance in accordance with law is mandatory. Such review of a judicial as distinguished from a legislative or administrative determination may be had as to either questions of law or of fact. The proposed procedure, however, for reasons of policy and not of law, limits court review solely to questions of law as heretofore described.

* * * * * * *

(p. 37) Jury trial need not be granted in the proposed procedure for the reason that the proceeding is not one at common law within the meaning of the provisions of the Constitution. It is of course true in addition that the taxpayer may, by paying his tax and suing the collector for a refund instead of petitioning the board, obtain a jury trial if he desires it.

* * * * * * *

(p. 37) Date on which decision becomes final.—Section 1005 prescribes the date on which a decision of the board (whether or not review thereof is had) is to become final. Inasmuch as the statute of limitations upon assessments and suits for collection, both of which are suspended during review of the Commissioner's determination, commences to run upon the day upon which the Board's decision becomes final, it is of utmost importance that this time be specified as accurately as possible. In some instances in order to achieve this result the usual rules of law applicable in court procedure

must be changed. For example, the power of the court of review to recall its mandate is made to expire 30 days from the date of issuance of the mandate.

3. REVENUE ACT OF 1926—EXTRACTS FROM HOUSE CONFERENCE STATEMENT, HOUSE REPORT NO. 356, 69TH CONGRESS, PAGES 53-55

Amendment No. 141: The House bill fixed the term of office of the members of the Board of Tax Appeals at 14 years. The Senate amendment reduces the term of office to 10 years; provides that no person who has been an employee of the Internal Revenue Bureau shall be eligible to appointment to any vacancy on the board until at least two years have elapsed since such official connection; and provides that the President by failing to fill vacancies may reduce the number of members of the board, if he determines at any time that the full membership is not necessary; and the House recedes with an amendment changing the term of office of members (after the original appointments) to 12 years, and striking out the prohibition with regard to the appointment of employees of the Internal Revenue Bureau and the provision authorizing the President to reduce the number of members of the board.

* * * * * * *

Amendment No. 150: The House bill provided that the decision of the Board rendered after the enactment of this act may be reviewed by the Circuit Court of Appeals or the Court of Appeals of the District of Columbia if a petition for such review is filed by either the commissioner or the taxpayer within 90 days after the decision is rendered. The Senate amendment provides that an appeal should lie to the district court of the district in which the taxpayer resides, if notice of appeal is filed within six months, and that the decision of the district court should be subject to review upon appeal as an ordinary civil action. The Senate amendment also clarifies the provisions of the House bill relating to an appeal which involves the validity of only a part of the defi-

ciency determined by the board; and the House recedes with an amendment providing that the decision of the board rendered after the enactment of this act may be reviewed by a circuit court of appeals or the Circuit Court of Appeals of the District of Columbia (as provided in section 1002) if the petition for such review is filed by either the commissioner or the taxpayer within six months after the decision is rendered; making it clear that the court rules will include rules for the preparation and certification of the record, and making clerical changes.

Amendment No. 151: Under the House bill, in case of a corporation which had failed to make a return, a decision of the board would be reviewed by the circuit court of appeals for the circuit in which is located the office of the collector to whom the corporation should have made the return. The amendment provides that in such case the decision may be reviewed by the Court of Appeals of the District of Columbia, and also provides that the commissioner and the taxpayer may, in any case, stipulate the court to which the review will be taken, in order to remove any doubt as to the proper court; and the House recedes.

* * * * * * *

Amendment No. 155: The House bill provides that the appellate court shall have power to remand cases to the board for rehearing only if there had been prejudicial error by the board in ruling upon admissibility of evidence. The amendment strikes out this provision and provides that an appellate court may, in modifying or reversing a decision of the board, remand the case for rehearing, as justice may require; and the House recedes.

4. REVENUE ACT OF 1928—EXTRACT FROM REPORT OF COMMITTEE ON WAYS AND MEANS, HOUSE REPORT NO. 2, 70TH CONGRESS, PAGES 30-31.

Sections 601 and 602 make a number of amendments with respect to the procedure of the Board of Tax Appeals.

Under the 1924 Act, no appeal was had from the decision of the Board of Tax Appeals. The Government could sue for the amount of any deficiency allowed by the board and the taxpayer could sue for the amount of any refund by the board. In such suits the findings of fact of the board constituted *prima facie* evidence. Under the 1926 Act the decision of the board is not the basis for court suit. If either party is dissatisfied with the decision, an appeal may be taken but a final decision in the case is binding on both the Government and the taxpayer. In accordance with the new procedure, the findings of the board are no longer *prima facie* evidence in court suits. Neither are such findings necessary as evidence in subsequent proceedings, for on appeal the circuit courts of appeal have available the narrative record of the evidence presented to the board.

The committee is of the opinion that in view of the above considerations, findings of fact are no longer necessary. The record in case of appeals can be prepared properly without a detailing finding of facts, and the board may be relied upon to include in its opinion enough facts to support the legal conclusions reached. It may be, however, that in certain exceptionally complicated cases it would be deemed desirable for the board to make formal findings of fact. Consequently the committee provides that the power to make such findings be not entirely eliminated but left to the board's discretion. The omission of findings of fact would not permit the circuit courts of appeals to substitute their judgment on the facts for that of the board, for under existing law the courts are able to reverse or modify decisions of the board (so far as questions of fact are concerned) only if there is no evidence to support the decision of the board and such decision is therefore arbitrary.

FORCE AND EFFECT OF RULES.—A recent decision by the circuit court of appeals for the seventh circuit indicates that there is some disposition to regard the Board of Tax Appeals

as an investigative rather than a judicial body, and to require it to reach its decisions not merely on the basis of the evidence presented in the record, but on the basis of such additional evidence outside the record as may be necessary fully to develop the taxpayer's case. The committee is of the opinion that the board's function is purely judicial, and in order to clarify the situation has provided that no decision of the board (whether rendered before or after the bill becomes law) should hereafter be modified or reversed because the board or any of its divisions has failed to consider evidence not adduced before the board or division. At the same time the committee has provided that the rules of practice and procedure of the board shall, just as the Federal equity rules, have the force and effect of law.

5. REVENUE ACT OF 1928—EXTRACT FROM REPORT OF COMMITTEE ON FINANCE, HOUSE REPORT NO. 960, 70TH CONGRESS, PAGES 37-38.

SECS. 601-603. BOARD OF TAX APPEALS.

MODIFICATION OR REVERSAL OF BOARD DECISION.—In view of certain expressions in a recent court opinion, the House bill in section 601 provides that no decision of the board shall be modified or reversed because the board has failed to consider evidence not adduced before it. While an appellate court has the right and duty, if an error of law has been made, to remand a case to the board for subsequent proceedings in accordance with law, the existing provisions of law clearly contemplate judicial, not administrative, procedure on the part of the board and the committee can see no need of further legislation on this subject. It is not the duty of the board to make investigations of tax cases but to decide the case on the basis of evidence properly placed before it by the commissioner and the taxpayer.

6. REVENUE ACT OF 1928—EXTRACTS FROM HOUSE CONFERENCE STATEMENT, HOUSE REPORT NO. 1882, 70TH CONGRESS, PAGES 21-22.

Amendment No. 183: The House bill provided that no decision of the board should be modified or reversed because of its failure to consider evidence not adduced before it in evidence. The existing law is clear that the board need not consider evidence not properly placed before it and that it need not conduct independent investigations of the facts of cases pending on its docket. In view of this, the Senate eliminated the House provisions; and the House recedes.

FILED
APR 15 1926

Supreme Court of the United States,

OCTOBER TERM, 1925.

No. 130.

OLD COLONY TRUST COMPANY, *et al., Executors*

vs.

COMMISSIONER OF INTERNAL REVENUE.

On Certificate from the United States Circuit Court of Appeals for the First Circuit.

BRIEF FOR OLD COLONY TRUST COMPANY ON QUESTIONS STATED IN ORDER FOR REARGUMENT.

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Supreme Court of the United States,

OCTOBER TERM, 1928

OLD COLONY TRUST COMPANY, *et al.* Executors, AGAINST COMMISSIONER OF INTERNAL REVENUE	No. 180.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR OLD COLONY TRUST COMPANY ON QUESTIONS STATED IN ORDER FOR REARGUMENT.

This brief is filed in answer to the questions of the Court in the order announced February 18, 1929, restoring the cause to the docket for reargument. A copy of the order is attached as "Appendix A". This brief is confined to the questions stated in the Court's order for reargument and avoids repetition of arguments made in our *original brief* on the merits and our *supplemental brief* on the jurisdiction question, requested by the Court after the arguments on the merits.

Statement of the Case.

The only change in the certificate, amended pursuant to the suggestion in the order, is to include in the first paragraph a statement of dates of the steps in the proceedings below in this case. Such paragraph now reads:

> "This is a petition to review a decision of the United States Board of Tax Appeals. The petitioners are the executors of the will of William M. Wood, deceased. On June 27, 1925, the Commissioner of Internal Revenue notified Mr. Wood by registered mail of the determination of a deficiency in income tax against him for the years 1919 and 1920, under the Revenue Act of 1918. The amount of this deficiency was revised by the Commissioner's letter of August 18, 1925. On August 22, 1925, an appeal was taken to the Board of Tax Appeals. In response to an order to make petition more definite and certain, an amended petition was filed October 27, 1925. The hearing before the Board of Tax Appeals was held April 11, 1927, and the decision of the Board of Tax Appeals was rendered November 12, 1927. The Board of Tax Appeals approved the action of the Commissioner and found a deficiency in the federal income tax of Mr. Wood for the year 1919 of $708,781.93, and for the year 1920 of $350,837.14. The petition for review in this Court of the decision of the Board of Tax Appeals, pursuant to the Revenue Act of 1926 and Rule 38 of this Court, was perfected December 23, 1927."

This case, therefore, is one in which the petition was filed in the Board before the passage of the Revenue Act of 1926 and the hearing before the Board was after the passage of that act.

The remainder of the certificate, setting forth the facts giving rise to the question on the merits, is set forth in the Commissioner's brief on the merits (pp. 6-8).

Propositions Discussed and Summary of Argument.

The answers to the questions of the Court here submitted by counsel for the taxpayer are as follows:

I. There was power in Congress to confer jurisdiction upon the Circuit Court of Appeals to review action by the Board of Tax Appeals.

A. The Board of Tax Appeals was created by Congress to furnish independent determination of tax liabilities before payment, and the review of its decisions by the Circuit Courts of Appeals is an essential part of the Congressional plan.

B. Congress has power to provide for review by the Circuit Courts of Appeals of any "case" or "controversy."

C. The proceedings to review action of the Board of Tax Appeals present to the Circuit Court of Appeals for decision a "case":

The subject matter of the proceedings—tax determination—is a proper one for judicial cognizance.

The judgment of the Circuit Court of Appeals is effective as the final and indisputable basis of action by the parties.

Judgments in proceedings instituted after passage of 1926 Act determine the rights of both parties in respect of all taxes for the year involved in the proceeding.

Judgments in proceedings instituted before but heard after passage of 1926 Act determine the rights of the parties as to the "deficiency".

A "case" is presented by the review proceedings whether the Board be regarded as a "judicial" or as an "administrative" tribunal and whether the review proceeding be regarded as appellate or original in the Circuit Court of Appeals.

II. The Circuit Court of Appeals apparently acts as a tribunal of appellate jurisdiction in considering appeals from the Board of Tax Appeals, but even if the jurisdiction of such court is original, the Court may certify to this Court questions deemed necessary for the proper decision of a pending cause. Answering such questions is an appellate function.

III. The practice of taxing officials where, by agreement between the parties, the tax liability upon income actually received by one of them has been paid by another, has varied. In tax-free covenant bond cases the practice finally adopted was to add no amount to the income received by the bondholder. In other cases apparently some amount has been added to the income received by the taxpayer, but varying methods of computing such amount have been used, and the practice has not been uniform, long-continued, or generally acquiesced in.

IV. The applicable statutes do not authorize the taxing officers to estimate total income by adding to the amount actually received by the taxpayer any tax which another has paid thereon under agreement between the parties.

Provisions of Constitution and Statutes.

The provisions of the Constitution and the statutes deemed material to the question of jurisdiction raised by the Court are set forth in Appendix A of our supplemental brief and also in Appendix A of the supplemental brief for the Commissioner.

The statute authorizing the certifying of questions, Title 28 of the United States Code, Section 346, 43 Stat. 938, provides:

> "In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, the Court at any time may certify to the

Supreme Court of the United States any questions or propositions of law concerning which instructions are desired for the proper decision of the cause; and thereupon the Supreme Court may either give binding instructions on the questions and propositions certified or may require that the entire record in the cause be sent up for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there by writ of error or appeal."

I. There was power in Congress to confer jurisdiction upon the Circuit Court of Appeals to review action by the Board of Tax Appeals.

A. The Board of Tax Appeals was created by Congress to furnish independent determination of tax liabilities before payment, and the provision for the review of its decisions by the Circuit Courts of Appeals is an essential part of the Congressional plan.

Under the statutes relating to the Board of Tax Appeals as existing since the enactment of the Revenue Act of 1926, the taxpayer is given a right to an independent determination of the amount of any disputed Federal income or estate tax liability before he is required to make payment, and to a final court adjudication of any relevant question of law. Before the Board of Tax Appeals was created, there was no way in which a taxpayer could avoid paying any amount which might be demanded by the Commissioner of Internal Revenue as additional income or estate taxes. (*Graham* v. *Dupont,* 262 U. S. 234, Section 3224 R. S.) His only remedy was through a claim for refund and suit in court after payment.

With the imposition of very heavy taxes in 1917 and thereafter, the amount of which often turned on difficult

questions of fact and law, there frequently resulted demands for enormous sums in excess of those set forth by taxpayers on their returns as the amounts properly due. Justice required a change in Federal tax procedure so that there could be an independent determination before payment of additional demands was exacted.

The Board of Tax Appeals was established by Congress under the Revenue Act of 1924 to meet this need. It is described in the statute as "an independent agency in the executive branch of the Government". As existing since 1926, it is composed of 16 members appointed for definite terms by the President by and with the advice of the Senate. (Sections 900, 901*.) The Board functions like a court in determining the amount of income or estate taxes due to the Government from a particular taxpayer. The Board's jurisdiction is invoked by a petition from a taxpayer attacking a determination of the Commissioner as to an amount claimed (called the "deficiency") in excess of that shown on the taxpayer's return (Sections 274, 308). The detailed provisions are set forth in our supplemental brief (pp. 4-7) which also shows the power of Congress to create such a body with such powers (pp. 10-13).

The Board decisions are made final and conclusive except for the court review on appeal. The Board enters an order determining the amount of the deficiency in accordance with its findings of fact and opinion. A deficiency disallowed by the Board cannot be collected; any overpayment by the taxpayer found by the Board must be credited or refunded by the Commissioner, and it is the duty of the Commissioner to collect any amount found due by the Board. (Sections 274 (b), 284 (e).) It is further provided that in cases instituted after the 1926 Act, no claim for refund can be allowed and no suit maintained in respect of the taxable year involved. (Section 284(d).)

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*Section references are to Revenue Act of 1926, c. 27, 44 Stat. 10, except where otherwise noted.

After the Board has rendered its decision, either the Commissioner or the taxpayer may file a petition for review by a Circuit Court of Appeals or the Court of Appeals of the District of Columbia. (Section 1001(a).) The courts are authorized to adopt rules for the filing of petitions and conduct of proceedings, and such rules have been adopted substantially in the form recommended by the conference of the Senior Judges, presided over by the Chief Justice of the Supreme Court, held on September 17, 1926. (Section 1001(b).) Upon such review, the Circuit Courts of Appeals are given power:

> "to affirm, or if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for rehearing, as justice may require." (Section 1003(b).)

The jurisdiction of such courts to review decisions of the Board is "exclusive", except as provided in Section 239 of the Judicial Code; and the judgment of any such court "shall be final", except upon certiorari from this court. (Section 1003(a).)

We are advised that the practice is for the Circuit Court of Appeals to enter an order that the decision of the Board be reversed, affirmed, or modified, or the case remanded to the Board for further proceedings, and directing the clerk to issue the proper mandate. The order and mandate are in form similar to those issued upon review by such courts of a judgment of a district court.

The status of the Board and of its decisions since the enactment of the Revenue Act of 1926 differs from that under the Revenue Act of 1924, which originally created the Board, and which was considered by this Court in *Blair* v. *Oesterlein* (1927), 275 U. S. 220; *Williamsport Wire Rope Co.* v. *U. S.* (1928), 277 U. S. 551. Under the 1924 Act the deficiency determined by the Board was asssessed and collected but the taxpayer could file a claim for refund and if such claim were denied sue for recovery of the tax. (Section

281, Revenue Act of 1924; Section 3226 R. S.) If the Board disallowed the deficiency claimed by the Commissioner, the Commissioner could not assess or distrain but could sue for such deficiency without assessment. (Section 274 (b), Revenue Act of 1924.) In such court proceedings the case was tried *de novo* but the Board's findings of fact were *prima facie* evidence of the facts. (Section 900 (g), Revenue Act of 1924.)

Under the Revenue Act of 1926, however, the decision of the Board, unless reversed or reviewed by the courts, is final and conclusive on the parties, as above set forth.

With respect to petitions filed before but heard after the passage of the 1926 Act, as in the case at bar, the statute provides that

> "the powers, duties, rights and privileges of the Commissioner and of the person who brought the appeal, and the jurisdiction of the Board and of the courts shall be determined * * * in the same manner"

as in other cases, except that the prohibition (Section 284 (d)) against any refunds or suits in respect of the taxable year is inapplicable. (Section 283 (b).) The effect of this exception is discussed *infra*, pp. 17-19.

Without provision for court review, the Congressional purpose of the Board of Tax Appeals could not be accomplished. Congress in undertaking to provide for independent review of additional tax liabilities before payment, by the changes adopted in the light of experience under the 1924 Act, indicated its purpose that such determination should be made final for all purposes, and that it should at the same time be kept in harmony with determinations effected by the earlier method of review through the courts after payment, still left open to taxpayers as an alternative. Decisions of the Board of Tax Appeals could not be made final unless subject to court review, without subjecting both the Government and the taxpayer to the consequences of possible errors of law by the Board and to the danger that two interpretations of the law might develop, one through the Board and another through court interpretation in refund cases.

Congress was not satisfied to leave decisions in Board proceedings as merely *prima facie* evidence in court as under the 1924 act. It desired to make them "final", and that plan and the relief thereby afforded to the Government and to taxpayers from twice litigating the same issues must fail if the provisions for court review are held to be invalid. Congress made the Board decisions final *subject to the court review provided*, and it is clear that Congress had no intention of making Board decisions final *without that review*.

A decision that the provisions for court review are invalid would thus also cast grave doubt upon the validity of all the provisions relating to the Board of Tax Appeals. A decision that the provisions for court review, although valid generally, are invalid in respect of proceedings instituted before but heard after the 1926 Act, likewise would cast grave doubt upon the status of the Board and the rights of the Government and the taxpayers. Some of the extremely serious practical consequences of any such decision are pointed out on pages 22-25 of our supplemental brief. Clearly such a decision would put in doubt the status with regard to the statute of limitations of all taxes involved in Board proceedings.

B. Congress has power to provide for review by the Circuit Courts of Appeals of any "case" or "controversy".

As Circuit Courts of Appeals are "inferior courts" of the United States, Congress has power under Article III of the Constitution to invest them with jurisdiction, either original or appellate, of any proceeding which presents for decision by them a "case" or "controversy". The extent, nature and form of jurisdiction which may be confererd upon them rests in the unfettered discretion of Congress.

Stevenson v. *Fain* (1904), 195 U. S. 165, 167;
Mayor v. *Cooper* (1867), 6 Wall, 247, 251;
Insurance Company v. *Dunn* (1873), 19 Wall 214, 226.

This Court has said, referring to this clause of the Constitution:

> "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws and treaties of the United States, when any question respecting them shall receive such a form that the judicial power is capable of acting on it." (*La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423, 456.)

C. The proceedings to review action of the Board of Tax Appeals present to the Circuit Court of Appeals for decision a "case".

The general rule as laid down by this Court is that

> "Whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the Constitution, whether the subject of the litigation be property or status." (*Tutun* v. *United States* (1926), 270 U. S. 568.)

The decisions of this court establish that the following elements are essential to a "case": adverse parties (*South Spring Mining Co.* v. *Amador Medean Gold Mining Company* (1892), 145 U. S. 300); an actual controversy and not merely moot or abstract questions (*Muskrat* v. *United States* (1911), 219 U. S. 346-361); a matter which is a proper subject of judicial cognizance (*Keller* v. *Potomac Electric Company* (1923), 261 U. S. 428, 444; *Postum Cereal Company* v. *California Fig-Nut Company* (1927), 272 U. S. 693); a decision which is a final and indisputable basis of action of the parties (*La Abra Silver Mining Company* v. *United States* (1899), 175 U. S. 423, 456-7; *Gordon* v. *United States* (1864), 117 U. S. 697; *In re Sanborn* (1893), 148 U. S. 222). The leading cases establishing these elements are reviewed in *Willing* v. *Chicago Auditorium Association* (1928), 277 U. S. 274.

Upon a petition to the Circuit Court of Appeals to review Board action there are obviously adverse parties—the Commissioner representing the Government asserting a tax—a money demand—and a particular taxpayer resisting such demand. There can also be no doubt that there is presented a real and actual controversy. Nor can there be any doubt that the matter arises in proceedings regularly established by Congress for the determination of the controversy.

The discussion will therefore deal with the three phases of the question which seem to merit consideration, *i. e.,* whether the subject matter is one for judicial cognizance; whether the judgment is "final", and whether the fact that the proceeding for review originates out of proceedings in the Board of Tax Appeals, and is in form appellate presents any difficulty.

(1) *The subject matter of the proceeding—tax determination—is a proper one for judicial cognizance.*

Proceedings of a Circuit Court of Appeals to review action of the Board (in cases other than special assessment) present to the court the same subject matter as a suit for the refund of a tax—always a "case" or "controversy". The matter presented to such court in this case is identical with that presented in the companion case of *United States* v. *Boston & Maine Railroad.*

The subject is obviously not the determination of a mere administrative matter, such as that dealt with by this court in *Postum Cereal Company* v. *California Fig-Nut Company, supra,* where it was held that a decision of the Commissioner of Patents refusing to cancel the registration of a trade mark, was administrative, and that therefore determination of the correctness of the Commissioner's action did not present a case for the constitutional courts.

In respect of matters of tax determination, however, it is clear that they constitute the proper subject matter of judicial cognizance when "put in such form that the judicial

power can act upon them." This is the effect of the opinion of the Court in the leading case of *Murray's Lessee* v *Hoboken Land and Improvement Co.* (1855), 18 Howard 272. In the course of a thorough discussion it was stated that while there could lawfully be an administrative determination of whether a customs collector was indebted to the United States, there could be no doubt that this same question might be one of judicial cognizance when the United States has so consented, and that though such consent might have been withheld, when such consent is given,

> "nothing which may not be a subject of judicial cognizance is brought before the court" (p. 284).

In the case at bar the United States has consented to the proceeding in the Board of Tax Appeals with review by the Circuit Court of Appeals.

The case so presented is very closely analogous to the cases as to customs duties arising under the Customs Administrative Act of 1890 and before the changes effected by the Act of May 7, 1908 (35 Stat. 406) and subsequent acts. The Board of General Appraisers had jurisdiction to decide cases as to the rate and amount of duties chargeable upon imported merchandise, and its decision was final and conclusive except for review in the Circuit Court of the United States (subsequently in the Circuit Court of Appeals). No question was raised as to the validity of this procedure during the many years it was in effect, and this court and the lower Federal courts passed upon many cases.

U. S. v. *Lies* (1898), 170 U. S. 628, particularly page 636;
Marshall Field v. *Clark* (1892), 143 U. S. 649.

See also
U. S. v. *Stone & Downer Co.* (1927), 274 U. S. 225.

(2) ***The judgment of the Circuit Court of Appeals is effective as the final and indisputable basis of action by the parties.***

(a) *Judgments in proceedings instituted after passage of 1926 Act determine the rights of both parties in respect of all taxes for the year involved in the proceeding.*

There is no basis for doubt that the effect of a judgment of the Circuit Court of Appeals upon a petition filed after the passage of the 1926 Act is finally to adjudicate the rights of the parties in a manner meeting all requirements as to finality of judgments in "cases".

The statutory provision as to the jurisdiction of the Circuit Court of Appeals and the nature of its judgment, applicable to all review cases, is as follows:

> "The Circuit Courts of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board (except as provided in Section 239 of the Judicial Code as amended); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in Section 240 of the Judicial Code as amended." (Section 1003(a).)

It is hard to see that there could be any want of finality in a judgment rendered by a court having exclusive jurisdiction under a statutory provision declaring that such judgment shall be "final". "Final" as here used clearly refers to the character of the judgment, not to the time when the judgment becomes effective.

The statute provides effective machinery by which the judgment becomes the indisputable basis of action of the parties. The decision of the Board if found by the court not to be in accordance with law is modified or reversed by the court. (Sec. 1003(b).) The decision of the Board which has been the subject of the review proceedings, if not modified or reversed, becomes "final" (in this connection referring to time and meaning "effective") upon the expiration of the time allowed for filing a petition for certiorari. (Sec. 1005(a) (2) and (4).) If the decision is to be modified or reversed in accordance with the mandate of the Supreme

Court on certiorari or the judgment of the Circuit Court of Appeals "the decision rendered in accordance with the mandate * * *" becomes final after thirty days unless the taxpayer has instituted proceedings to have the decision corrected so it will accord with the mandate, in which event the decision of the Board becomes final when so corrected. The decision of the Board when so made to accord with the judgment of the Court in review proceedings must then be carried out by administrative officers and submitted to by the taxpayer. Thus Section 274(b) provides:

> "the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed as such by the decision of the Board which has become final shall be assessed or be collected by distraint or by proceeding in court with or without assessment."

If the decision is that the taxpayer has overpaid, the amount of such overpayment must be credited or refunded as provided in the statute. [Sec. 284(e).]

There is, of course, no execution in these cases, but execution is never used as against the Government. In that respect the procedure is similar to that in Court of Claims cases, where judgment is to be paid pursuant to mandatory statutory duties out of appropriations by Congress. (Section 1089, R. S.) In suits against collectors for the recovery of taxes, execution is specifically prohibited where there was probable cause. The amount of the judgment shall be "provided for and paid out of the proper appropriation from the Treasury". (Section 989, R. S.)

Nor is execution necessary as against the taxpayer. The Commissioner having made an assessment against the taxpayer for the amount of the deficiency determined by Board decision, as he is expressly required to do, can of course collect by distraint and is required to make collection. The taxpayer cannot enjoin such collection.

It seems clear also that even apart from the provision in the Act referred to below, prohibiting suit by the taxpayer, the taxpayer could not after payment maintain a claim or suit based on grounds rejected by the Circuit Court of Appeals in the review proceedings. In any such suit he would be met by the express provision of the Act that the decision of the Court of Appeals "*shall be final*".

It is obvious that a judgment having the conclusive effects above described is not subject to any objection of want of finality as in the case of *Gordon* v. *United States* (1864), 117 U. S. 697, and that it furnishes the indisputable basis of action between the parties as clearly as the judgment of the Court of Claims in *La Abra Silver Mining Company* v. *United States* (1899), 175 U. S. 423, 456-7, held by this court to be sufficient. The decision in *Fidelity National Bank* v. *Swope*, 274 U. S. 123, also shows that execution is not essential to "finality" of a judgment. In that case this court held that an intermediate judicial review of administrative proceedings, to be followed by further administrative action, constituted a case where the judgment of the court, without execution, was the final basis for further administrative action. See also *Tutun* v. *United States* (1926), 270 U. S. 568, 576-7.

The statute makes the further provision, applicable in cases where the Board petition was filed after the 1926 Act, that:

> "* * * *no credit or refund in respect of the tax for the taxable year* in respect of which the Commissioner has determined the deficiency shall be allowed or made and *no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court* * * *" (with certain exceptions not here material). (Sec. 284 (d).) (Italics ours.)

This section of course prevents any re-litigation of the matters involved in the judgment of the Circuit Court of Appeals, but is much broader than that and prevents further litigation of any matter whatever "in respect of the tax

for the taxable year". This prohibition carries out the policy, evidenced by other provisions of the statute, of making any tax board proceeding instituted after the 1926 Act, with the specified court review, a proceeding for adjudication of all matters relating to taxes for the year involved. As above indicated, however, the prohibition was not necessary to assure finality of judgments of the Circuit Court of Appeals in review cases in respect of matters actually adjudicated.

(b) *Judgments in proceedings instituted before but heard after the 1926 Act determine the rights of the parties as to the deficiency asserted.*

When the 1926 Act was passed, petitions were pending before the Board of Tax Appeals under the Revenue Act of 1924. Under the 1924 Act the Board could deal only with the additional tax or deficiency asserted by the Commissioner, and petitions filed under that act were directed merely to the resistance of the particular deficiency asserted. There was no provision for court review and a decision by the Board was not final but the findings of the Board were merely *prima facie* evidence in court proceedings which might be brought by either party.

Congress provided that the provisions of the 1926 Act should govern petitions filed under the 1924 Act, but not heard until after the passage of the 1926 Act, and that

> "the powers, duties, rights and privileges of the Commissioner and of the person who has brought the appeal and the jurisdiction of the Board and of the courts shall be determined * * * in the same manner"

as in other cases, except that the prohibition against any refunds or suits in respect of the taxable year shall not apply. (Section 283 (b).) Reasons for the non-application of this prohibition are indicated below.

It results that in these cases brought under the 1924 Act, but heard after the passage of the 1926 Act (as the case at

bar), a judgment of the Circuit Court of Appeals is final under the same provisions as are applicable in cases instituted after the 1926 Act, and also that the same statutory machinery applies here for putting the judgment of the court into operation as the indisputable basis of the action of the parties.

It has been suggested, however, that there may be lack of finality in decisions in these cases, on the ground that the taxpayer, not being subject to the prohibition of Section 284(d), may file a claim or bring suit for refund, and in such subsequent proceeding relitigate the matters previously adjudicated by the Circuit Court of Appeals in the review proceedings. This suggestion is unfounded. The mere absence of a prohibition against a suit or claim gives rise to no affirmative right, and any attempt to relitigate the same issue in another proceeding would be defeated by the application of the statutory provision that the judgment of the Circuit Court of Appeals shall be "final". Litigation against the Government for recovery of taxes can be maintained only with the consent of Congress. What basis would there be for holding that a second suit could be maintained where Congress has consented to a procedure for court determination in which the jurisdiction of the court is exclusive and its judgment "shall be final"?

Any such suggestion rests on a misconception of the purpose and effect of the prohibition of Section 284(d), not applicable in this class of cases, but applicable in other cases. What that section prohibits is *making of any claim* or the maintenance of *any* suit in respect of *any tax whatsoever for the taxable year involved in the petition to the Board.* It carries out the purpose of the statute that a petitioner who goes to the Board after the 1926 Act must have *all questions* as to his tax liability settled in that proceeding. This was a matter of policy, not a matter essential to finality of the review proceeding. Congress did not require that petitioners who already had petitions pending when the 1926 Act was passed convert their proceedings for

the resistance of a deficiency into proceedings for determining all questions affecting tax liability for the taxable year. The cause presented by such proceedings was left a cause to prevent the collection of that deficiency unless enlarged by amendment.

The excepting of those petitioners from the prohibition of Section 284(d) leaves them free to maintain suits or claims on grounds not presented in the Board proceedings for resistance of a particular deficiency. Resistance of a particular deficiency or additional tax asserted by the Commissioner is not the only cause which may arise as to taxes for the year involved. Other controversies might arise, as is illustrated by the case of the Old Colony Railroad Company, No. 407, being heard with this case. No. 407 is here on review of a tax board determination of a "deficiency" of $765.66, turning on the question whether certain premiums on bonds constitute income for 1920. The same taxpayer has a suit against the United States for refund of all original tax paid for 1920 on the ground that its return should have been consolidated with that of its lessee, the New York, New Haven & Hartford R. R. The Court has held, and we believe correctly, that such suit, involving matters different from those presented in the Board proceedings, may be maintained. *Old Colony Railroad Company* v. *United States* (1928), 27 Fed. (2d) 992; see *Emery Executor* v. *United States* (1928), 27 Fed. (2d) 994.

Should a subsequent suit by or against the taxpayer with respect to taxes for the year involved in Board proceedings of this class, which had been the subject of review, present or turn upon any matter which was presented to the Circuit Court of Appeals in the review proceedings, it is our belief that the provision that the judgment of the Circuit Court of Appeals is final would conclude the parties in respect of that matter. The effect of the "final" judgment of the Circuit Court of Appeals would be similar to the application which must be given to any judgment of a competent court under the principles of *res adjudicata*. Where the same

cause is presented as was previously adjudicated, the prior judgment operates as an absolute bar, but where the cause is different the prior judgment is conclusive, as between the parties, in respect of the matters actually adjudicated.

Cromwell v. *County of Sac* (1876), 94 U. S. 351;
Troxell v. *Del. Lack. & West. R. R.* (1913), 227 U. S. 434;
United States v. *California Bridge Co.* (1917), 245 U. S. 337;
United Shoe Mach. Co. v. *United States* (1922), 258 U. S. 451.

The principles of *res judicata* would apply in any suit between the taxpayer and the United States as to the taxes involved in a review proceeding between the taxpayer and the Commisioner, as the United States is the real party in the latter proceeding.

Minnesota v. *Hitchcock* (1901), 185 U. S. 373;
Oregon v. *Hitchcock* (1905), 202 U. S. 60;
Louisiana v. *McAdoo* (1914), 234 U. S. 627.

There has never been, to our knowledge, any express statutory prohibition against claims or second suits for refund of taxes based on identical grounds rejected in a prior suit in court for refund, but it would not be suggested that the judgment in the first suit lacked finality. The effectiveness of such judgments to prevent second suits results not from statute but from application of the principles of *res adjudicata*. For stronger reasons a judgment, which under the statute is made in the exercise of "exclusive jurisdiction" and is "final" will effectively prevent re-litigation of the issues presented. The United States having consented to one such final judgment, there can be no basis for holding that general provisions consenting to tax litigation operate as a consent to any subsequent re-adjudication of such issues. (See pp. 20-21, Supplemental Brief.)

We may add that even if it could be held that the matters adjudicated by the Circuit Court of Appeals could be relitigated in the event that the decision was favorable to the Government, the decision of the Circuit Court of Appeals in the cause presented to it is sufficiently final for the purpose of a "case".

There is no requirement that a judgment in a tax case must necessarily determine the rights of the parties in such manner "that they could never again be litigated". The decision of the Circuit Court of Appeals in the case at bar certainly has the same results as the granting or denial of a permanent injunction in respect of the collection of taxes. If against the Government, the injunction is permanent. If against the taxpayer, the tax must be collected. Even aside from the construction which must be given to the statutory provision that the judgment shall be "final", its results are sufficient for the presentation of a "case". An analogous situation was dealt with in the leading case of *Weston* v. *City of Charleston*, 2 Peters, 449. See particularly the remarks of Chief Justice Marshall on page 464. The decision in that case established the law.

Mt. Vernon Cotton Co. v. *Alabama Power Co.* (1916), 240 U. S. 30;

Detroit, Etc., Ry. Co. v. *Michigan R. R. Co.* (1916), 240 U. S. 564;

Cf. *Sage* v. *United States* (1919), 250 U. S. 33.

A judgment of the Circuit Court of Appeals *favorable to the Commissioner* in a case instituted before but heard after the 1926 Act, therefore, not only imposes the duty of collection of the deficiency asserted but also is conclusive as between the parties on the merits of the issues presented in respect of that "deficiency". We have already pointed out that in this class of cases *if the judgment of the Circuit Court of Appeals is favorable to the taxpayer,* such judgment is undoubtedly conclusive. The Commissioner is prohibited from collecting the "deficiency".

It results that the judgment of the Circuit Court of Appeals reviewing action of the Board is a final and binding adjudication of the cause presented whether the case be one in which the proceeding was instituted in the Board before or after the passage of the 1926 Act.

(3) *A "case" is presented by the review proceedings whether the Board be regarded as a "judicial" or as an "administrative" tribunal and whether the review proceedings be regarded as original or appellate in the Circuit Court of Appeals.*

In our supplemental brief, we have set forth grounds for the view that the Board of Tax Appeals is a "legislative tribunal" properly exercising a judicial function, and that so regarded review of its decisions by the Circuit Court of Appeals is proper (pages 10-16). There is no requirement that a case originate in a "constitutional" court. Such review has been long sustained in the case of decisions of the state courts (*Martin* v. *Hunter* [1816], 1 Wheat. 304) and has also been sustained in cases which had their origin in state administrative tribunals (*Boom Company* v. *Paterson* [1879], 98 U. S. 403; *Road District* v. *St. Louis, Southwestern R. R. Company* [1922], 257 U. S. 547). It is also sustained in cases originating in courts of the District of Columbia, which are not "constitutional" courts, although decisions of such courts cannot be reviewed where the matter presented is not a "case" (*Keller* v. *Potomac Electric Company* [1923], 261 U. S. 428). This court can review action of the Court of Claims in cases where the court exercises judicial powers, although not where it exercises non-judicial power (*Degroot* v. *United States* [1866], 5 Wall. 419, 427; *Gordon* v. *United States, supra*). Review by this court of decisions of the Court of Private Land Claims, which was not a "constitutional" court, was similarly sustained (*United States* v. *Coe* [1894], 155 U. S. 76).

We have also indicated in the supplemental brief our view that the review by the Circuit Courts of Appeals is proper, even if the Board of Tax Appeals is to be regarded as an "administrative" tribunal authorized to make a decision judicial in nature (pp. 15-19). It is established by the decisions there referred to that decisions of such tribunals in the exercise of such powers may properly be reviewed by the "constitutional" courts in proceedings *de novo* "denominated appeals for want of a better term" (*Stephens* v. *Cherokee Nation* [1879], 174 U. S. 445, 447).

It is also established that there may be review of such decisions by proceedings in substance appellate. No suggestion has been made that the procedure by which appeals from decisions of the Board of General Appraisers were reviewed by the "constitutional" courts was invalid, although the court proceeding was held to be an "appeal" in substance.

United States v. *Lies*, 170 U. S. 628, 636.

The decision in this case seems directly to sustain the review provided for in the statute under consideration. The similarity of the statutes in respect of the Board of Tax Appeals and of the Board of General Appraisers when this case arose is well pointed out in the brief of the Bar Association (pp. 33-37).

Additional reason for sustaining the review in this case is found in the fact that it is limited to questions of law. There can be no doubt that the review is so limited. The statute clearly contemplates such limitation (Section 1003(b)); the legislative history shows that such was the Congressional intent (S. Rept. No. 52, 69th Cong. pp. 36-7); and the Circuit Courts of Appeals have unanimously held that their function is to pass on questions of law, the findings of fact of the Board being conclusive if supported by evidence.

Blair v. *Curran*, 24 Fed. (2d) 390 (C. C. A. 1st);

Luscomb v. *Commissioner*, (not yet reported, Feb. 18, 1929, C. C. A. 2nd);

Bishoff v. *Commissioner*, 27 Fed. (2d) 91 (C. C. A. 3rd);

Avery v. *Commissioner,* 22 Fed. (2d) 6 (C. C. A. 5th);

Brown v. *Commisioner,* 22 Fed. (2d) 797 (C. C. A. 5th);

Bogle v. *Commissioner,* 26 Fed. (2d) 771 (C. C. A. 7th);

Kendrick Coal & Dock Co. v. *Blair,* 29 Fed. (2d) 559 (C. C. A. 8th);

Feeder's Supply Co. v. *Commissioner,* (not yet reported. Feb. 20, 1929, C. C. A. 8th);

Royal Packing Co. v. *Commissioner,* 22 Fed. (2d) 536 (C. C. A. 9th).

There is no difference in substance between such review by the Circuit Courts of Appeals of Board decisions and the review by them of orders of the Federal Trade Commission. The validity of the latter review is not questioned. (See pp. 17-19 supplemental brief.)

The effect of limiting the court review to questions of law is emphasized by the opinion of this court in *Keller* v. *Potomac Electric Company,* 261 U. S. 428, where it was held that the complete review on questions of law and fact in respect of decisions of the District of Columbia Utilities Commission did not present a "case". It was urged that the situation in that case was similar to review by the courts of matters arising in the Federal Trade Commission and the Interstate Commerce Commission. The court pointed out that the review of action of both those tribunals is confined to questions of law, and indicated that such a review does not bring the court "too intimately into the legislative machinery". (261 U. S. 442.) The review in respect of the Federal Trade Commission is "appellate and revisory". (*Federal Trade Commission* v. *Eastman Kodak Company,* (1927) 274 U. S. 619.) The review of Interstate Commerce Commission orders is in a proceeding in form original. It seems to follow that the form of a procedure for review of

such action by an "administrative tribunal" is not material so long as the court's function on review is confined to deciding questions of law.

This is particularly true where the decision below, even if regarded as that of an "administrative" tribunal, is as clearly judicial in character as the decision of the Board.

> *Blair* v. *Oesterlein Machine Company* (1927) 275 U. S. 220, 226.

The decision of the Board deals with a subject matter undoubtedly of judicial cognizance—a controversy between adversary parties—turning upon the application of existing law as to past transactions. It is presented in regular proceedings provided for by law. The tribunal proceeds in the manner of a court on pleadings, with both parties represented, holding open hearings and determining the facts on the basis of evidence introduced before it in a regular way under legal rules of evidence. The tribunal makes an effective determination of the controversy, with findings of fact and rulings on questions of law. That the Circuit Court of Appeals in review proceedings passes only upon questions of law, of course, does not prevent what is before the court from being a "case" in the constitutional and judicial sense. The questions before the court have the same aspect as on stipulated facts or demurrers. Under the procedure provided in the statute both parties have elected to have the Board find the facts as warranted by the evidence—the taxpayer through electing to file his petition and the United States by establishing the statutory procedure. The terminology used by Congress in providing for review proceedings of such cases is, of course, not controlling on questions of constitutional power.

From the standpoint of constitutional power there is no substantial difference between such a control by the Circuit Court of Appeals of Board action on questions of law, and the review which the courts from time immemorial have exercised over the action of inferior tribunals—boards or the like—not in the regular judicial system, by writ of

certiorari. A case in the court on application for such a writ is perhaps original in the sense of the beginning of the "cause" but it is in substance appellate in that what is involved is a limited review of action of the inferior tribunal, usually on questions of law.

The Circuit Court of Appeals' review of action of the Board of Tax Appeals, therefore, presents no constitutional difficulty whether such review be regarded as involving an original or an appellate proceeding and whether the Board be regarded as an "administrative tribunal" making decisions judicial in nature, instead of a "legislative tribunal" exercising judicial power.

II. The Circuit Court of Appeals apparently acts as a tribunal of appellate jurisdiction in considering appeals from the Board of Tax Appeals, but even if the jurisdiction of such Court is original, the Court may certify to this Court questions deemed necessary for the proper decision of a pending cause. Answering such questions is an appellate function.

A. The Circuit Court of Appeals apparently acts as a tribunal of appellate jurisdiction in considering appeals from the Board of Tax Appeals.

It is the essential characteristic of appellate jurisdiction that it deals with a proceeding in a cause already instituted, but does not create that cause.

Marbury v. *Madison* (1803), 1 Cranch 137, 175;
The Alicia (1868), 7 Wall. 571, 573;
Baltimore & Ohio R. R. Co. v. *I. C. C.* (1909), 215 U. S. 216, 225.

It seems to follow that the determination of whether the Circuit Court of Appeals acts as a tribunal of original or appellate jurisdiction within the above understanding, depends upon the nature of the *Board*. If the Board is a legislative tribunal exercising a judicial function, as contended in our supplemental brief (pp. 10-16), the "cause" apparently originates in the Board and, hence, the Circuit Court of Appeals acts as a tribunal of appellate jurisdiction. If the Board is an administrative tribunal making decisions judicial in nature, presumably the "cause" with which the Court deals is created in that Court and, hence, it acts as a tribunal of original jurisdiction.

In form the proceeding is undoubtedly appellate. The Court's function is

> "to affirm, or if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for rehearing, as justice may require." (Section 1003(b).)

The rules relating to appellate proceedings upon writ of errors so far as applicable, were to govern pending adoption by the Courts of other rules. (Section 1001(b).) The case is not tried *de novo;* no new evidence is introduced; and the findings of fact of the Board are conclusive if supported by the evidence.

This Court has held that the jurisdiction of the Circuit Court of Appeals is "appellate and revisory" under the analogous provisions for review of orders of the Federal Trade Commission. *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U. S. 619.

If the Board acts as a legislative tribunal exercising a judicial function, it therefore, seems clear that the Circuit Court of Appeals acts as a tribunal of appellate jurisdiction revising and correcting the decision below instead of creating the "cause". Certifying questions by the Circuit Court of Appeals in cases within its appellate jurisdiction is of course proper.

B. Even if the Circuit Court of Appeals acts as a tribunal of original jurisdiction, certifying questions is proper. Answering such questions is an appellate function.

It is clear, we submit, that the *statutes* as they now stand *provide* for certifying to this Court by the Circuit Courts of Appeals of questions deemed necessary for the proper decision of a pending appeal from the Board of Tax Appeals.

Title 28 of the United States Code, Section 346 (*supra*, p. 5), referred to by this Court, provides that the Circuit Courts of Appeals may certify questions

> "in any case, civil or criminal",

and that the Supreme Court may give binding instructions or require that the entire record be sent up for consideration. This statute is usually referred to as Section 239 of the Judicial Code.

Section 239 of the Judicial Code, as in effect prior to the amending act of February 13, 1925 (43 Stat. 938), changing it to read as above, limited the power to certify questions to cases within the

> "appellate jurisdiction as defined in Section one hundred and twenty-eight".

The omission of this limitation in the general revision of the statutes as to federal procedure in the Act of February 13, 1925, of itself, would seem sufficient to establish that no limitation to appellate cases was intended by the amended statute, particularly as in terms it is applicable to "any case".

It is possible that the omission of the limitation to appellate cases was not made with express reference to the contingency that some cases might be regarded as "original" in the Circuit Court of Appeals. It seems clear, however, that the purpose was to confer jurisdiction to certify in *all* cases of which the Circuit Court of Appeals had jurisdiction

without regard to their technical classification. (See report of hearing before sub-committee of the Committee on the Judiciary, United States Senate, February 2, 1924, pages 7, 9, 12, 13, 18 and 28 [particularly page 13]; see also report of hearing before Committee on the Judiciary, House of Representatives, December 18, 1924, page 15.)

The amending act of February 13, 1925, itself contains express provisions for the application of the certification section to the direct review by the Circuit Courts of Appeals of orders of the Federal Trade Commission and certain matters arising in the Interstate Commerce Commission and the Federal Reserve Board. Upon such reviews, the Circuit Courts of Appeals act as "tribunals of original jurisdiction" at least to the same extent as upon the review of Board of Tax Appeals action. (Section 348, Title 28, U. S. Code, as amended May 20, 1926, c. 347, Section (b), 44 Stat. 578; Section 45, Title 15, U. S. Code; Section 21, Title 15, U. S. Code.) There was no Circuit Court of Appeals' review of Board of Tax Appeals decisions when the Act of February 13, 1925, was passed, but the statute providing for such review expressly refers to Section 239, as applicable. (Section 1003(a).) It is apparent, therefore, that the statutes provide for certifying questions arising upon review of Board action.

We are unable to see that the provision for certifying questions in cases to review Board action pending in the Circuit Court of Appeals, even if regarded as original in that Court, presents any constitutional difficulty. The mere answering of questions so certified will not be the exercise of original jurisdiction by this Court. The function of answering questions has always been considered appellate.

See

Dow v. *Johnson* (1879), 100 U. S. 158, 163;
Columbus Watch Company v. *Robbins* (1893), 148 U. S. 267, 269;
United States v. *Rider,* 163 U. S. 132, 135.

Under the Judiciary Act of 1802 (Act of April 29, 1802, c. 31, 2 Stat. 156, 157), providing for certifying questions upon division of opinion in the Circuit Courts, questions were commonly certified in original cases before judgment.

Ogden v. *Blackledge* (1804), 2 Cranch 272;
United States v. *Gurney* (1808), 4 Cranch 333;
Sergeant's Lessee v. *Biddle* (1819), 4 Wheat. 508;
Miller v. *Stewart* (1824), 9 Wheat. 680;
Bank of United States v. *Owens* (1829), 2 Pet. 527;
Kirkman v. *Hamilton* (1832), 6 Pet. 20;
City of New York v. *Miln* (1837), 11 Pet. 102;
Ex Parte Milligan (1866), 4 Wall. 2.

It is only when the original case is transferred to this court prior to judgment that the action of this court can be deemed original. *Baltimore & Ohio Railroad Company* v. *I. C. C.* (1909), 215 U. S. 216, 224; *White* v. *Turk,* 12 Peters 238, 239; *Webster* v. *Cooper,* 10 Howard 54, 55.

No question as to the validity of the provision of the present statute that this Court may call up the entire record arises. No attempt has here been made to certify the entire case, nor has the Court suggested that it is necessary. Under the decisions, it would perhaps not be within the constitutional power of this Court to call up the record in this case if regarded as original in the Circuit Court of Appeals. There is, however, ample scope for the exercise of the power to call up the record conferred by the statute, where questions are certified in cases in which the Circuit Court of Appeals is exercising appellate jurisdiction. The fact that a statute applied in certain circumstances would be unconstitutional, does not affect the validity of the statute in its application to other circumstances.

Dahnke-Walker Co. v. *Bondurant* (1921), 257 U. S. 282, 289;
Dorchy v. *Kansas* (1926), 272 U. S. 306, 309.

See also

United States v. *Coe* (1894), 155 U. S. 76, 83.

It is respectfully submitted, therefore, that even if the Circuit Court of Appeals acts as a tribunal of original jurisdiction in this connection, the mere certifying of the questions is authorized by the statute and presents no constitutional difficulty.

III. The practice of taxing officials where, by agreement between the parties, the tax liability upon income actually received by one of them has been paid by another, has varied. In tax-free covenant bond cases the practice finally adopted was to add no amount to the income received by the bondholder. In other cases apparently some amount has been added to the income received by the taxpayer, but varying methods of computing such amount have been used, and the practice has not been uniform, long-continued, or generally acquiesced in.

So far as is shown by published regulations, rulings and decisions, the practice of the Bureau of Internal Revenue has been as follows:

In cases where the obligor of a bond agreed to pay some part of the income tax of the bondholder on the interest, the practice of the Bureau of Internal Revenue from 1913 to 1918 was to require the bondholder to report the full interest received, but it did not require him to add to the interest received the income tax thereon paid for him by the obligor of the bond.

Article 6, Regulations 33 (1914);
Article 122, Regulations 33 (1918).

By Article 31 of Regulations 45 (April, 1919), the Commissioner held that income tax paid for the bondholder by the obligor of such a bond was in the nature of additional

interest and should be included in the gross income of the bondholder. The Circuit Court of Appeals for the Third Circuit decided such income tax was not in fact income to the bondholder.

Duffy v. *Pitney,* 2 F. (2d) 230 (1924); Certiorari denied, 267 U. S. 595.

The Commissioner, by T. D. 3685 (1925) modified Article 31 of Regulations 45 to conform to the court decision. This was the final determination as to the practice which should be followed for the years 1913 to 1920. For 1921 and subsequent years the Revenue Acts have specifically provided that no income tax paid for the bondholder by the obligor of tax-free covenant bonds should be added to the income of the bondholder.

Section 234(a)(3), Revenue Acts of 1921, 1924, and 1926;
Section 144(a)(4), Revenue Act of 1928.

The Commissioner held that the ruling that income tax paid at the source was not income of the taxpayer applied only to tax-free covenant bond cases.

S. M. 3570, IV-2 C. B. p. 35.

In cases where the lessee of property agreed to pay rent and to pay any income tax of the lessor on such rent, it seems to have been the practice of the Commissioner to add some amount to the rent received by the lessor, but varying methods of computing such amount have been used. The formal regulations of the Bureau of Internal Revenue do not deal specifically with the treatment of such tax payments. They do provide generally that taxes paid by a tenant for his landlord are gross income of the landlord and are taxes deductible by him. As income taxes are not deductible, this regulation clearly was not intended to apply to income taxes.

Article 4 (par. 57), Regulations 33, (Rev.);

Article 109, Regulations 45 and 62;
Article 110, Regulations 65 and 69;
Article 130, Regulations 74.

Since January 2, 1918, the regulations have likewise provided:

> "When a corporation shall have leased its property in consideration that the lessee shall pay in lieu of rental an amount equivalent to a certain rate of dividend on its capital stock or the interest on its outstanding indebtedness, together with taxes, insurance or other fixed charges such payments shall be considered rental payments and shall be returned by the lessor corporation as income, notwithstanding the fact that the dividends and interest are paid by the lessee direct to the stockholders and bondholders of the lessor."
>
> *Article 102,* Regulations 33 (Rev.);
> *Article 456,* Regulations 45;
> *Article 547,* Regulations 62, 65 and 69;
> *Article 70,* Regulations 74.

The incidental reference to taxes in this regulation does not indicate that any consideration was given to the special problems arising from the shifting of the incidence of the income tax itself.

The Commissioner has used at least three methods of computation in estimating the amount to be added to the rent accruing to the lessor for any year by reason of the obligation of the lessee to pay the income tax thereon. These different methods are not consistent.

(a) In some cases, as in the case of *Commissioner of Internal Revenue* v. *Old Colony Railroad* (No. 407), the Commissioner has added to the income received only the initial tax thereon. Thus, in No. 407 the Commissioner increased accrued income for 1920 by $6,960.64 on account of the amortization of the bond premium, and added to income a further amount of $696.06.

> "on the theory that the income tax of 10% should be computed upon the amount of $6,960.64 mentioned

above, and that this tax, if payable by the petitioner's lessee under the terms of the lease, constituted additional income to the petitioners". (R. No. 407, p. 8.)

The deficiency in the lessor's income tax asserted was $765.67, but only part of this amount, payable by the lessee, was added to the lessor's income. This method of computation was also used by the Commissioner in the following cases:

Appeal of Providence & Worcester Railroad, 5 B. T. A. 1186;

Appeal of Norwich & Worcester Railroad Co., 2 B. T. A. 215;

Vermont & Massachusetts Railroad Company v. *Commissioner,* 8 B. T. A. 500;

Manchester & Lawrence Railroad v. *Commissioner,* 8 B. T. A. 506.

(b) In some cases, as in the case of *United States* v. *Boston & Maine Railroad* (No. 129), the Commissioner added to the rent accrued for the taxable year not only the initial tax on such rent, but the secondary tax on the initial tax, the tertiary tax on the secondary tax, etc. In No. 129 the initial tax of 6% on the actual rent for 1917 was $61,422.06 but the Commissioner added to 1917 income the amount of $65,342.61. (R. No. 130, p. 2.) The $65,342.61 was 100/94ths of $61,422.06, and the effect of this computation was that the Commissioner added to income the initial tax of $61,422.06, the 6% income tax thereon of $3,685.32, and the 6% income tax thereon of $211.12, etc., thus "pyramiding" the tax and assessing a tax on a tax.

The same method was followed by the Commissioner in *Appeal of American Telegraph & Cable Company,* 2 B. T. A. 991.

(c) In one case the Commissioner used a hybrid method, pyramiding so far as the income tax was concerned, but not attempting to pyramid with respect to excess profits tax. In this case the Commissioner computed the income and excess profits tax for 1917 by taking 100/94ths of the rent ac-

crued for 1917, added the tax so computed to income and then recomputed the income and excess profits taxes. The result was that the Commissioner added $41,400.28 to income, although the lessee was actually called upon to pay $42,010.60 and the initial tax on the rent accrued would have been but $36,603. *Concord & Montreal Railroad* for 1917, a companion case in the District Court to No. 129. See page 28 of Record in the Circuit Court of Appeals for the First Circuit in *United States* v. *Boston & Maine Railroad.*

In the case of taxpayers on a cash basis, such as the *Old Colony Trust Company* case (No. 130), the Commissioner added to the income of the taxpayer only the income tax actually paid by someone else in the taxable year. In No. 130 the amount added was the initial income tax on the employee's salary and it is not possible to tell from any published ruling whether the Commissioner would hold that the employee realized further income if the employer paid not only the initial tax on the salary, but also the secondary tax on the initial tax.

In A. R. M. 16, C. B. 2, p. 62 (Jan. 1920) it was held, with no discussion, that where the vendee of property had agreed to pay the vendor's income tax on any gain on the sale, the amount of income tax paid by the vendee was income of the vendor for the year in which paid. We are advised that this ruling was later revoked by an unpublished ruling, and still later was reinstated.

In view of this varying practice, the principle that the courts will give weight to a uniform, long continued and generally acquiesced in administrative construction of an ambiguous statute, has no application here.

United States v. *Healy,* 160 U. S. 136;
Iselin v. *United States,* 270 U. S. 245;

Even if there had been a uniform departmental practice, that would not, of course, determine the court's decision as to the meaning of the term "income".

Eisner v. *Macomber,* 252 U. S. 189;

United States v. *Supplee-Biddle Hardware Co.*, 265 U. S. 189;
Merchants Loan & Trust Co. v. *Smietanka*, 255 U. S. 509;
Gould v. *Gould*, 245 U. S. 151.

IV. The applicable statutes do not authorize taxing officers to estimate total income by adding to the amount actually received by the taxpayer any tax which another has paid thereon under agreement between the parties.

There is no provision of the applicable statutes authorizing taxing officers to estimate total income at any amount in excess of the income received by or accruing to the taxpayer for the taxable year, or to add any amount thereto. The statute governing in No. 130 (Revenue Act of 1918), merely imposes a tax on "the net income of every individual". (Section 210.) "Net income" is defined as "gross income" less statutory deductions. (Section 212(a).) "Gross income" is defined to include rent, salaries, wages and compensation for personal services, and gains, profits or income from any source whatever. (Section 213.) There is no specific provision as to whether income tax paid for the taxpayer by the payor of his income, is itself income, and the only provision dealing specifically with such income taxes is Section 234(a)(3), which denies to corporate obligors of bonds any deduction for income taxes paid for bondholders pursuant to a tax-free covenant in such bonds.

The Commissioner's authority is to determine the correct amount of income and the tax thereon pursuant to the statute. (Section 250(b); Section 1305.) The Commissioner is given discretion to estimate reasonable deductions in the case of depreciation, depletion and amortization, (Section 214(a)(8)(9)(10)) but is nowhere given author-

ity to estimate items of gross income in any case. The Commissioner cannot by regulation or practice modify or enlarge the statutory measure of the tax.

Morrill v. *Jones*, 106 U. S. 466;
United States v. *Two Hundred Barrels of Whiskey*, 95 U. S. 571.

The method of accounting employed is unimportant except to determine whether an item of income shall be taxed in the year received or the year accrued, and never operates to make an item income in any year which is never received or accrued. (Section 212(b).)

Our original brief, pages 4 to 28, sets forth the argument showing that income tax paid by another under agreement is not income of the taxpayer within the meaning of the statute, and that retaining income undiminished by an income tax is not to be treated as the receipt of more income.

Respectfully submitted,

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Appendix "A".

Order announced by the Chief Justice,
Monday, February 18, 1929.

No. 130. Old Colony Trust Company *et al.*, Executors, *v.* Commissioner of Internal Revenue.

"It is ordered that the above cause be restored to the docket for reargument. The Court especially desires assistance of counsel in respect of the following matters:

1. Was there power in Congress to confer jurisdiction upon the Circuit Court of Appeals to review action by the Board of Tax Appeals?

2. Does the Circuit Court of Appeals act as a tribunal of original jurisdiction when considering appeals from the Board of Tax Appeals? If so, may it under Title 28, United States Code, sec. 346, certify to this Court questions deemed necessary for the proper decision of a pending cause?

3. What has been the practice of taxing officers relative to assessments where, by agreement between the parties, the tax laid upon the income actually received by one of them has been paid by another?

4. Do applicable statutes authorize the taxing officers to estimate total income by adding to the amount actually received by the taxpayer any tax which another has paid thereon under agreement between the parties?

It is suggested that counsel apply to the Court below for an amendment so that the certificate will show distinctly when the original assessments were made, and under what acts. Also when the appeals were taken to the Board of Tax Appeals; when they were there decided; and when the appeals to the Circuit Court of Appeals were perfected.

And it is further ordered that case No. 407, Commissioner of Internal Revenue *v.* Old Colony Railroad, be assigned for argument with the above entitled cause on Monday, April 15 next."

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